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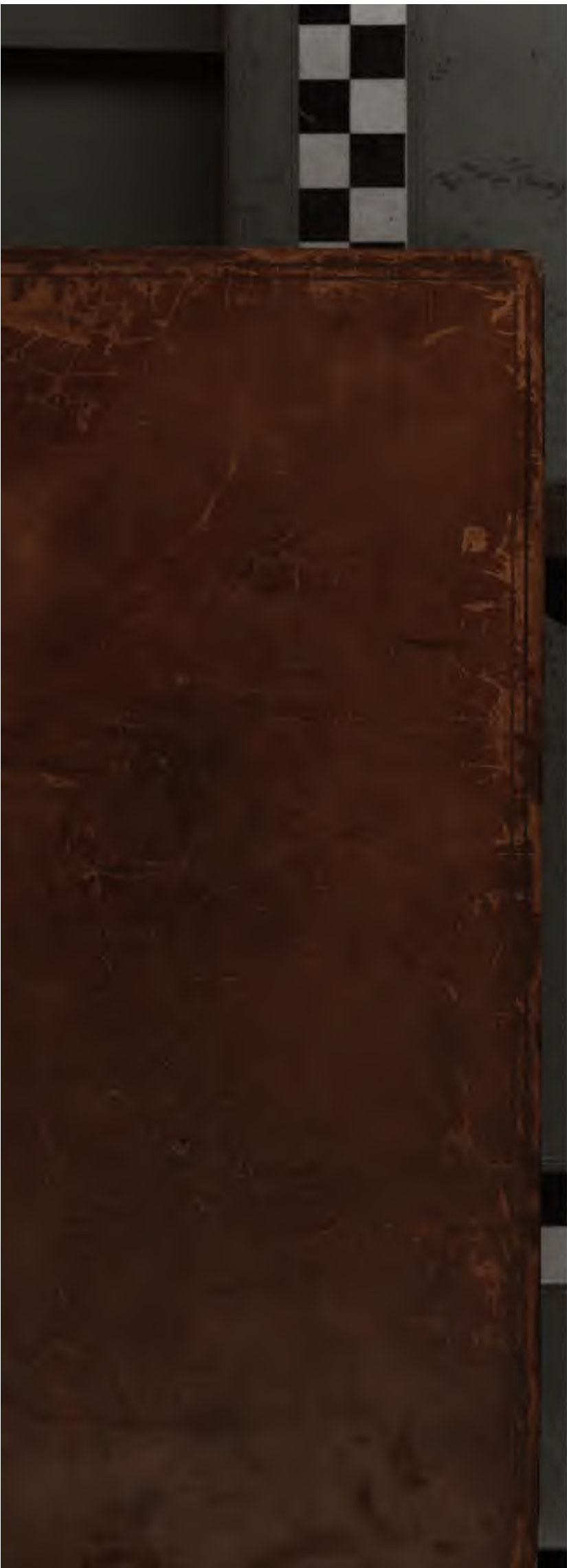
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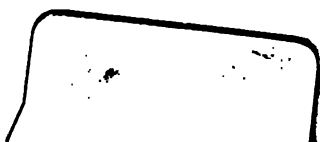


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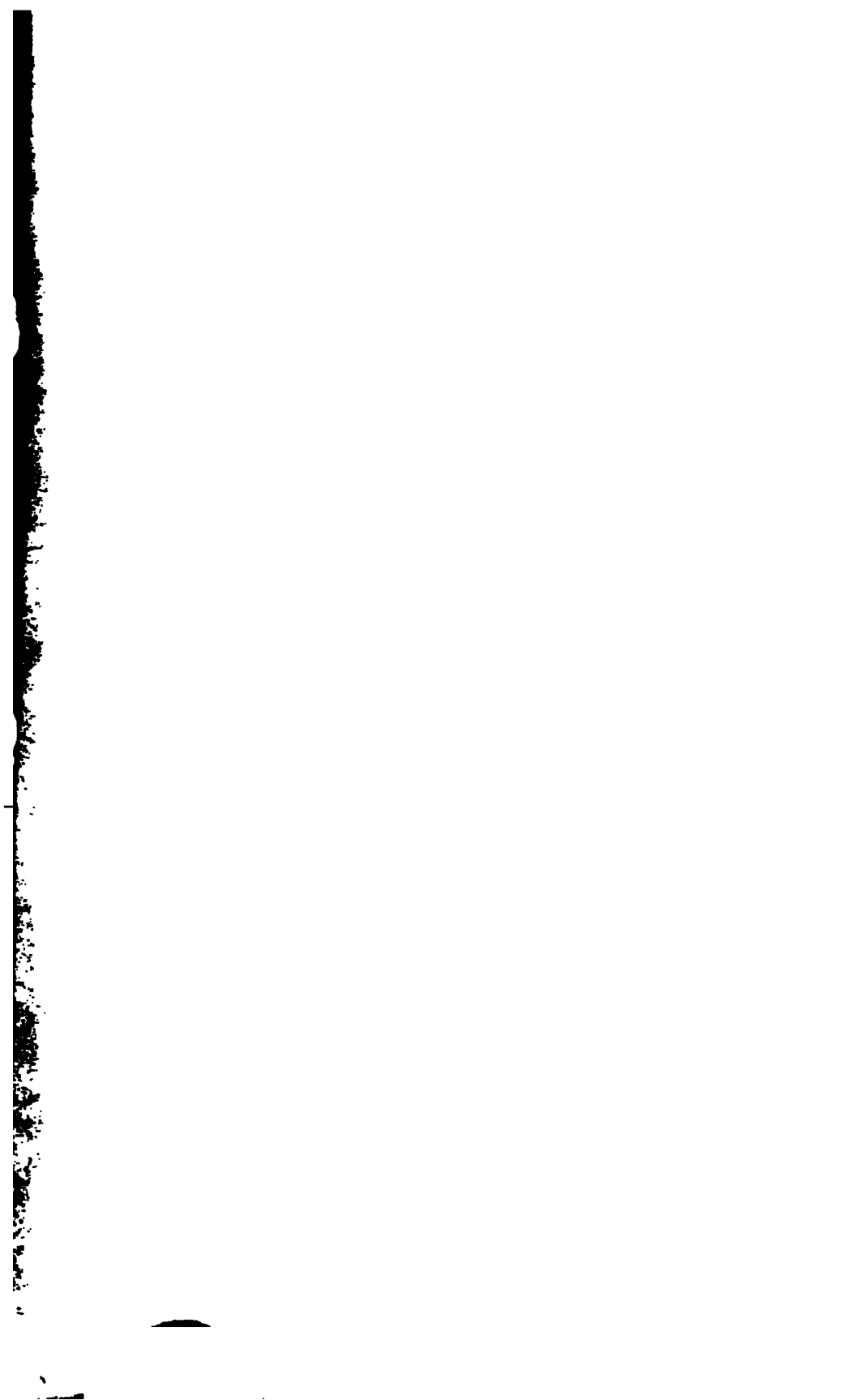
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REPORTS OF CASES

DECIDED IN THE

HIGH COURT OF CHANCERY,

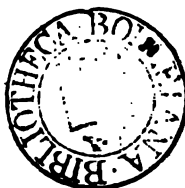
BY THE

RIGHT HON. SIR J. L. KNIGHT BRUCE,
VICE-CHANCELLOR.

BY

JOHN P. DE GEX AND JOHN SMALE,
OF LINCOLN'S-INN, ESQUIRES, BARRISTERS-AT-LAW.

—♦—
VOL. I.



MICHAELMAS TERM, 1846, TO THE END OF MICHAELMAS VACATION, 1847;
WITH A FEW CASES IN 1848 & 1849.

LONDON:

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1849.

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Master of the Rolls . LORD LANGDALE.

Vice-Chancellors . . . { SIR JAMES LEWIS KNIGHT BRUCE.
SIR JAMES WIGRAM.

Solicitors-General . { SIR DAVID DUNDAS.
SIR JOHN ROMILLY.

* * The Cases in the present Volume, as far as *Habershon*
v. *Blurton* inclusive, are reported by MR. COLLYER.

ERRATA.

Page 487, *dele the reference to Trotter v. Trotter.*

„ 482, *note (c), for 2 P. W. read 3 P. W.*

„ 515. The report accurately represents the statement of the answer, which was, that a case had been laid before Sir *Samuel Romilly* in 1825 ; but there must have been some mistake in the pleading, for Sir *Samuel Romilly* died in 1818.

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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

High Court of Chancery,

COMMENCING IN

MICHAELMAS TERM, 10 VICT. 1846.

1846.

WESTWOOD v. SLATER.

Nov. 19th,
20th.

BY an indenture of settlement, dated the 14th December, 1804, and made between Samuel Wells and John Stephens, and Elizabeth Catherine his wife (Elizabeth Catherine being one of the three daughters of Samuel Wells) of the one part, and Henry Deering and Richard B. Slater of the other part, certain lands were conveyed to the parties of the second part upon trust, subject to the life interest of children, who were to take vested interests, if sons at twenty-one, and, if daughters, at twenty-one, or marriage: and if A. should have no children who should live to attain a vested interest in the fund, then to stand possessed of the share so given to A. and her children, in trust as to one moiety for the settlor's daughter B. and her children, and as to the other moiety for his daughter C. and her children, under the same limitations and restrictions to which the gift to A. and her children had been subjected. Then followed similar dispositions of the remainder of the trust fund in favour of B. and her children, and C. and her children, with limitations over of each share (in the event of either B. or C. dying without leaving children who should attain a vested interest) to the other two daughters and their children, in moieties as before. But in case there should not be any child or children of A., B., and C. who should live to gain a vested and transmissible interest in the said $\frac{1}{4}$ th parts, or any part thereof under and by virtue of the settlement, then the trustees were to pay, assign, and transfer the whole of the said $\frac{1}{4}$ th parts unto the next of kin of the settlor. The settlor died, having by his will made A., B., and C. his residuary legatees. After his death C. died without issue. Then B. died without issue, leaving A. surviving her, who had two children, one of whom, a daughter, was married:—*Held*, that A. having a child who had lived to gain a vested and transmissible interest in the fund, was not entitled to any portion of it under the limitation to the "next of kin" of the settlor; consequently that so much of the fund as did not pass under the limitations other than that to the next of kin, resulted to the settlor, and passed under his will to his residuary legatees.

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Samuel Wells therein, to sell the same and to lay out the monies arising from the sale in the public funds, and to stand possessed as to twelve fifteenth parts of such funds upon the following trusts, namely, as to two fifteenths, upon trust to pay the dividends thereof into the proper hands of Elizabeth Catherine, the wife of John Stephens, for her separate use during her life, and after her decease upon trust to pay, assign, and transfer all and singular the said two fifteenth parts unto and amongst all and every the present and future child and children of the said Elizabeth Catherine Stephens, and who as to a son or sons should live to attain the age of twenty-one years, and who as to a daughter or daughters should live to attain that age, or to be married, which should first happen, equally to be divided between and amongst them, if more than one, share and share alike; and if there should be only one such child, whether a son or daughter, then upon trust to pay, assign, and transfer the whole of the same two fifteenth parts to such one or only child at his age of twenty-one years, if a son, and at that age or marriage, which should first happen, if a daughter. But in case there should be no such child or children of the said Elizabeth Catherine Stephens, who as to a son or sons should live to attain the age of twenty-one years, and as to a daughter or daughters should attain that age or be married, then as to one moiety or equal half part of the said two fifteenth parts, upon trust to pay and apply the interest, dividends, and annual produce of the same moiety into the proper hands of Ann Bell, wife of Joseph Bell, the eldest of the three daughters of Samuel Wells, for her sole and separate use during her life, and from and after her decease, upon trust to pay, assign, and transfer the same moiety of the same two fifteenth parts unto, between, and amongst all and every her child and children, and who as to a son or sons should live to attain the age of twenty-one years, and who as to a daughter or daughters should live to attain that age or to

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of twenty-one years or day of marriage as to daughters, but nevertheless the transfer or payment thereof respectively should be postponed until after the decease of their respective mothers. The deed then gave power to the trustees, after the respective deaths of the daughters, to apply a portion of the shares of the children for their maintenance and education until their shares should be payable or transferrable. But in case there should not be any child or children of the said Elizabeth Catherine Stephens, Ann Bell, and Charlotte Wells, who should live to gain a vested and transmissible interest in the said twelve fifteenth parts of the said trust monies, stocks, funds, and securities, or any part thereof, under or by virtue of those presents, then it was declared that they the said trustees, and the survivor of them, and the executors, administrators, and assigns of such survivor, should *pay, assign, and transfer the whole of the said twelve fifteenth parts of the said trust-monies, stocks, funds, and securities, and the stocks, funds, and securities for the same, unto the next of kin of the said Samuel Wells.* Provided always, that, in case the said Charlotte Wells should have no child or children, who should live to gain a vested interest in the said five fifteenth parts thereof settled upon and intended for them, it should be lawful for the said Charlotte Wells, whether sole or covert, and notwithstanding her coverture, by her last will and testament in writing, or any codicil thereto, or any writing in the nature or purporting to be her last will and testament or codicil, to be by her duly made and published, to give, bequeath, and dispose of any sum or sums of money out of the part or share, parts or shares, (not exceeding one moiety thereof), which any such child or children of the said Charlotte Wells would have become entitled to either originally, or eventually, in case there had been any such who had lived to gain a vested interest therein as aforesaid, to such person or persons and in such manner as the said Charlotte Wells should think fit. And by the same indenture similar powers were

given to Elizabeth Catherine Stephens and Ann Bell over the several fifteenth parts of the fund respectively limited for the benefit of them and their children.

Samuel Wells died in 1809, having, by his will, bequeathed all the residue of his personal estate to his three daughters equally as tenants in common.

Soon after the death of Samuel Wells, the trustees of the settlement sold the real property comprised in it for £47,299.

Charlotte Wells, who, in the lifetime of her father, had married Henry Fraser, died in 1816, without having had a child, having, by her will, made in pursuance of the power in the settlement, bequeathed all that moiety of all and every sums and sum of money to which any child of hers should become entitled under the settlement, (in case there should not be any such as should live to gain a vested interest), and of which she had the power of disposal, unto her husband, Henry Fraser, for his own use and benefit.

Ann Bell survived her husband, Joseph Bell, and married Thomas Westwood. She died in 1839, without having had a child, having, by her will, (the form of which was similar to that of Mrs. Fraser), bequeathed a moiety of the funds in which she took an interest under the settlement, to her husband, Thomas Westwood, absolutely.

Elizabeth Catherine Stephens had two children, defendants to the present bill, one of whom, a daughter, was married to the defendant, Henry Mears.

The bill, which was filed by the personal representatives of Thomas Westwood against the representatives of the surviving trustee of the settlement, the executors of Samuel Wells, and Mrs. Stephens and her children, prayed a declaration of the rights of the respective parties interested in the trust funds.

The bill alleged, that, on the death of Charlotte Fraser, two twenty-fourths of the fund (two and a half thirtieths)

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were applicable for the benefit of Mrs. Stephens and her children, and two twenty-fourths were applicable for the benefit of Mrs. Westwood and her children. That, on the death of Mrs. Westwood, two twenty-fourths were applicable for the benefit of Mrs. Stephens and her children, and, as to two twenty-fourths, doubts were entertained whether they were not undisposed of and resulted to Samuel Wells; or whether one of them did not pass by the will of Charlotte Fraser, and the other result to Samuel Wells. That of the two twenty-fourths of Mrs. Fraser, which had devolved to Mrs. Westwood, one of them was disposed of by her will, and the other resulted to Samuel Wells. That the shares which resulted to Samuel Wells passed to his daughters and their representatives under his will. That, in the events which had happened, the plaintiffs, as the representatives of Thomas Westwood, claimed to be entitled to four twenty-fourths of the original fund, and one twenty-fourth in respect of the two twenty-fourths which accrued to Mrs. Westwood on the death of Mrs. Fraser; in other words, to six and a quarter thirtieths.

The defendant, Mrs. Stephens, by her answer, submitted that the two twenty-fourths and one twenty-fourth, or such other shares as were mentioned in the bill in that behalf, resulted to Samuel Wells as in the bill stated, but that they were limited by the indenture of the 14th of December, 1804, to the next of kin of Samuel Wells; and that she and her sisters were such next of kin, and that they took such part of the trust funds as so resulted, in joint tenancy; and as there was no severance, the defendant, Mrs. Stephens, became entitled by survivorship to the whole of such part or parts.

The cause now came on for hearing.

Mr. *Russell* and Mr. *H. Humphreys*, for the plaintiffs.

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were applicable for the benefit of Mrs. Stephens and her children, and two twenty-fourths were applicable for the benefit of Mrs. Westwood and her children. That, on the death of Mrs. Westwood, two twenty-fourths were applicable for the benefit of Mrs. Stephens and her children, and, as to two twenty-fourths, doubts were entertained whether they were not undisposed of and resulted to Samuel Wells; or whether one of them did not pass by the will of Charlotte Fraser, and the other result to Samuel Wells. That of the two twenty-fourths of Mrs. Fraser, which had devolved to Mrs. Westwood, one of them was disposed of by her will, and the other resulted to Samuel Wells. That the shares which resulted to Samuel Wells passed to his daughters and their representatives under his will. That, in the events which had happened, the plaintiffs, as the representatives of Thomas Westwood, claimed to be entitled to four twenty-fourths of the original fund, and one twenty-fourth in respect of the two twenty-fourths which accrued to Mrs. Westwood on the death of Mrs. Fraser; in other words, to six and a quarter thirtieths.

The defendant, Mrs. Stephens, by her answer, submitted that the two twenty-fourths and one twenty-fourth, or such other shares as were mentioned in the bill in that behalf, resulted to Samuel Wells as in the bill stated, but that they were limited by the indenture of the 14th of December, 1804, to the next of kin of Samuel Wells; and that she and her sisters were such next of kin, and that they took such part of the trust funds as so resulted, in joint tenancy; and as there was no severance, the defendant, Mrs. Stephens, became entitled by survivorship to the whole of such part or parts.

The cause now came on for hearing.

Mr. *Russell* and Mr. *H. Humphreys*, for the plaintiffs.

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as to the description of persons meant by "next of kin,"
Elmsley v. Young (a).

The VICE-CHANCELLOR.—This is a dispute not between two claimants under a settlement, but between the settlor himself and a person who alleges that something has been given to that person by the settlement, which allegation those who represent the estate of the settlor deny. Without questioning either of the cases mentioned by Mr. *Malins*, I am of opinion that this particular instrument exhibits an intention that the next of kin of the settlor should not take anything if there should be any child of either daughter who should live to gain a vested interest in the fund in question, or any part of it. Now, at least, one child of one daughter has lived to gain a vested interest in the fund in question, or some part of it.

DECLARE, that, upon the true construction of the indenture of settlement of the 14th of December, 1804, as to twelve fifteenths or twenty-four thirtieths of the capital trust monies therein comprised, Ann Westwood had power to appoint and did well appoint six and a quarter of the said twenty-four thirtieth parts of the said capital trust monies to Thomas Westwood; and that the plaintiffs, as his personal representatives, are entitled to the same as part of his personal estate. Declare, that Charlotte Fraser had power to appoint and did well appoint six and a quarter of the said twenty-four thirtieth parts of the said capital trust monies to Henry Fraser * * And declare, that, in the events that have happened, two and a half thirtieth parts of the said capital trust monies, upon the decease of Ann Westwood, remained undisposed of by the said indenture of settlement of the 14th of December, 1804, and reverted to the estate of the said Samuel Wells. And the defendants [*the executors of S. W.*], by their counsel, admitting that all the debts, and funeral and testamentary expenses, of the said S. W., and the legacies given by his will, have been paid, declare, that the said [*three daughters*], as residuary legatees in his said will, became entitled to the said two and a half thirtieth parts of the said capital trust funds so undisposed of by the said indenture of settlement of the 14th of December, 1804, as aforesaid, equally as tenants in common.

(a) 2 M. & K. 780.

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GEARY v. NORTON.

Nov. 23rd.

THE plaintiffs, Geary & Co., of Norwich, were patentees of a certain shawl, called the Royal Mecklenburgh Shawl. The defendants, Norton and Hanneford, were manufacturers at Huddersfield.

In April, 1845, Norton called upon Scott, a shawl manufacturer at Leicester, when Scott shewed him a woollen shawl which he said one of his workmen had purchased. Norton asked to take it away with him for a few days, which was permitted. It was returned soon afterwards by Norton, with a written order to Scott to make several others according to the pattern. Norton afterwards called again, when, in a conversation with Scott, he stated he had heard the shawl was registered, but he did not believe it. Scott stated that it was registered. Norton said, that, be that as it might, he had an order for one hundred, and they must be made. They were made and sent to Everington, Ellis, & Co., who paid for them.

In the interval between Norton's visits to Scott, he called upon Ellis, Everington, & Co., and shewed to Burrell, their principal assistant, a pattern of a shawl. Burrell said, "This is a copy of a shawl which I have, which is registered." Norton said, "I don't care if it is registered." Burrell said, "It is Norwich made; we have it from a Norwich house." Norton then offered to sell it at two-thirds less than the Norwich price; whereupon Burrell on behalf of Everington, Ellis, & Co., gave him an order for one hundred. Accordingly, on the 5th May, Everington, Ellis, & Co., received the invoice and goods.

On the 15th May, the plaintiffs' solicitors, Reed & Co., gave notice to Hanneford of their clients' intention to apply for an injunction to restrain the sale of the shawls. Hanneford immediately attended at the office of the plaintiffs' solicitors, when it was stated to him that instructions had

Upon the invasion of a patent right, the party complaining has a right to the protection of an injunction, although the other party may promise to commit no further infringement, and may offer to pay the costs of preparing the bill: and if the defendant do not, after injunction obtained, offer to pay the costs of it, the plaintiff may bring the suit to a hearing, and will be entitled to the costs of the suit.

Quære, whether in such a case the Court will give an account of damages.

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been given for a bill, and affidavits had been prepared, and that the costs incurred would be about £15 or £20. Hanneford without hesitation agreed not to sell any of the shawls, and to pay the costs. The parties then separated, but met again by arrangement, when the sum of £20 was named as the amount of the costs. The plaintiffs' solicitors, however, required an additional undertaking on the part of Hanneford not to make any shawls of the Mecklenburgh pattern, or of any pattern approaching thereto, under a certain penalty. To the latter proposition Hanneford refused to assent, and the matter remained unsettled.

On the following day, the defendants' solicitors sent the following letter to the plaintiffs' solicitors:—

“ 46, Ely-place, May 16th, 1845.

“ Gentlemen,—Your letter to Mr. Hanneford of the 15th May, containing copies of your letter of the 10th to Everington, Ellis, & Co., and Messrs. Norton and Hanneford, Mr. Hanneford has handed to us. Until the receipt of your letter, Mr. Hanneford had not any suspicion that any shawls sold by Norton and Hanneford were a piracy, nor does he now know it. But, in compliance with your letter he will immediately suspend the sale of any shawl of which he and Norton are the owners or holders, and which are or resemble the Royal Mecklenburgh shawl. Messrs. Norton and Hanneford are not the manufacturers of any shawls. We are, &c.

“ BOWER & SON.”

The plaintiffs took no notice of this letter, but filed their bill, and obtained an injunction against the defendants, upon the affidavits of Scott and Burrell, stating the foregoing facts as to the order and sale of the shawls to Everington & Co.

The prayer of the bill was, that the defendants may at the hearing, and in the meantime, be restrained from applying the aforesaid design, or any fraudulent colourable imitation thereof, for the purpose of sale, to the ornament of any

woollen or other shawl, or other article of manufacture, or of any woollen or other substance, and from publishing or selling, or exposing for sale, any shawl or other article of manufacture, or any substance to which such design, or any fraudulent or colourable imitation thereof shall have been applied, without the leave and consent of the plaintiffs; and that, if necessary, or for the benefit of the plaintiffs, the amount of loss or injury sustained by the plaintiffs by reason of the said defendants having printed the aforesaid design may be ascertained under the direction of this Honourable Court, and that the said defendants may pay the plaintiffs the amount so ascertained; the plaintiffs hereby waiving all penalties under the act of Parliament.

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The cause now came on for hearing.

Mr. *Russell* and Mr. *Stevens*, for the plaintiffs, asked an amount of damages according to the prayer of the bill.

The *Vice-Chancellor* asked the plaintiffs' counsel whether they were desirous of having the case to stand over, in order that precedents might be searched for as to the right to an account of damages.

Plaintiffs' counsel, not pressing that point, proceeded to contend, that, having proved the piracy and obtained an injunction, they were entitled to the costs of the suit: *Fradella v. Weller* (a).

Mr. *Wigram*, for the defendants, contended, that after every point had been conceded to the plaintiffs, they ought not to have put the bill on the file; they were, therefore, not entitled to their costs: *Millington v. Fox* (b).

The *Vice-Chancellor*.—Has it ever been decided, where a right of this kind has been invaded, and the invading party

(a) 2 Russ. & M. 247.

(b) 3 Myl. & Cr. 338.

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says he is doing wrong and will do so no more, that the party complaining is barred as to his costs, on filing a bill to have the protection of an injunction, rather than the promise of the person?

The VICE-CHANCELLOR.—In this particular case I am of opinion, that the plaintiffs were entitled to the protection of the injunction. I think, therefore, that when the injunction had been obtained, the course for the defendants to take was, to offer to pay the costs of the suit to that time, submitting to the injunction. As they have not done so, and as I am of opinion that the plaintiffs were entitled to the protection of the injunction, I must (though perhaps reluctantly) give them the general costs of the suit. Dismiss the bill, however, so far as it seeks an account of loss or injury, with costs not exceeding 40s.

Nov. 24th.
 Dec. 9th,
 22nd.

PEARSE v. PEARSE.

Upon settling interrogatories for the examination of a vendor in the Master's office, on a question of title between vendor and purchaser:
 —Held, that the vendor was

MARK BROADFOOT WESTRON being entitled to an estate, called the Barrow Estate, for his life, with remainder to the child or children by his late wife, Jenny Westron, as he should appoint, and for default of such issue to himself in fee, and being also entitled in fee simple to an estate called the Munscombe Estate, mortgaged his interest in both estates for £2300.

not compellable, at the instance of the purchaser, to state his motive for making a certain appointment, or to disclose confidential communications made by him to his solicitor and counsel respecting the property, although such communications were made merely on behalf of the consulting person singly, and were not made during a suit, during a dispute, or after the threat of a suit.

Quære, whether the client is compellable to disclose any confidential communication between him and his solicitor or counsel, which his solicitor or counsel would be privileged in refusing to disclose?

Cases laid before counsel, on behalf of a client, stand upon the same footing as other professional communications from the client on the one hand to the counsel or solicitor on the other; and, as far as relates to any discovery by the counsel or solicitor, the question of the existence or non-existence of any suit, claim, or dispute, is immaterial.

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such good title could be made, &c. And for the better discovery of the matters aforesaid, the petitioner and all other parties were to produce before the Master, upon oath, all deeds, books, papers, and writings, in their custody or power relating thereto, and were to be examined upon interrogatories as the Master should direct.

In pursuance of this order, interrogatories for the examination of the vendor were prepared on behalf of the purchaser; and such interrogatories having been settled and allowed by the Master, the vendor took exceptions to the Master's certificate of allowance.

The interrogatories commenced with an inquiry (which was not excepted to), whether at the time of the vendor Mr. Westron executing the deed-poll of the 10th of July, 1834, there was not some agreement, expressed or implied, between him and his daughter, Jane Morse Westron, that he should execute such appointment in her favour as therein contained, and that she should, upon her attaining twenty-one, or at some time, concur with him in raising the sum of £1900 (subsequently raised by him and her on the security of the articles of agreement of the 5th of May, 1835), by mortgage of their respective estates and interests in the premises comprised in such deed-poll; and whether there was not some agreement that she should subsequently further secure the mortgage debt then secured upon Mr. Westron's life estate and interest and reversion in fee in the premises, by joining in a mortgage in fee of the said premises in the manner expressed in the indentures of the 12th and 13th days of April, 1836; or whether Mr. Westron did not, at the time of his executing the said deed-poll, expect that his said daughter would join in raising the said sum of £1900, or some sum of money, or in securing such mortgage debt.

The passage which was the subject of the second exception (the first exception being general) was as follows:—
 “What was your motive or object in making the appoint-

ment to your daughter contained in the said deed-poll, and in particular in appointing to her an estate tail in the said premises, and in making such estate defeasible in the event of her dying under twenty-one as therein expressed?"

The third exception was to a passage inquiring as to the number, age, and property of the other children of the marriage. The fourth exception related to an inquiry as to conversations with the daughter relative to the appointment, raising the money, &c.

The following passages, which were preceded by an inquiry as to who was the solicitor or solicitors employed by the vendor in and about the preparation of the deed-poll, articles of agreement, and mortgage, formed the ground of the fifth and sixth exceptions:—"Did not any, and what letters or correspondence, pass between you and such solicitor and solicitors relative to such appointment, articles of agreement, and indentures of mortgage, respectively? If yea, what was the purport and effect of such letters and correspondence as you know or believe, and are or is such letters or correspondence now in your possession or power? If yea, produce the same; if not, declare what has become of, and when last you saw or heard of the same. What conversation or conversations passed between you and such solicitor or solicitors relative to the said appointment, articles of agreement, and indentures of mortgage, respectively? Did not you or your said solicitor or solicitors, by your order, lay or cause to be laid before Mr. Jacob Phillips, and whether or not before Mr. Preston, or some other gentleman or gentlemen, as counsel respectively, some, and what case or cases, statement or statements, or instructions relative to the appointment contained in the said deed-poll, or to the security effected by the said articles of agreement, and indentures of mortgage respectively, or to any other matter or thing consequential upon, or incidental thereto; and whether or not the drafts of the said instruments respectively? If yea, what has become of such case or cases,

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and of the drafts thereof respectively, and of such drafts of the said instruments as aforesaid respectively? If the same is or are in your possession or power, produce the same; if not, declare what has become thereof respectively, and when last you saw or heard of the same, and what was the date or dates, and the purport and effect thereof, according to the best of your remembrance, recollection, and belief."

The seventh exception was to an inquiry relative to a statement alleged to have been made by Mr. Westron's counsel before the Master, to the effect that opinions had been taken upon the validity of the appointment; and to a suggestion that such statement had been made in consequence of instructions received from Mr. Westron or his solicitors. The eighth exception related to an inquiry as to communications between the vendor and the solicitors who prepared the appointment, since the execution of the deeds relating thereto, and the opinions taken thereon. The ninth exception was to an inquiry as to the bills of costs of the solicitor who prepared the deeds of appointment, &c.

The exceptions coming on for hearing, the second, third, and fourth were disposed of in the first instance.

Mr. *Russell* and Mr. *W. Rudall*, for the exceptions.

Mr. *Swanston* and Mr. *Belt*, *contra*.

The case of *Flight v. Robinson* (a) was referred to.

The *Vice-Chancellor*, in disposing of the second exception, observed that the question had arisen in settling interrogatories in the Master's office between vendor and purchaser upon a question of title. It was unnecessary

(a) 8 Beav. 22.

to say how the matter would have stood if the question to which objection had been made had related to a particular agreement, or particular conversation. The question being asked when and where it was, and in the shape in which it was, his Honor was of opinion that the vendor ought not to be required to answer it, in the present stage of the case at least.

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The third and fourth exceptions were overruled.

On a subsequent day the remaining exceptions came on for argument.

Dec. 9th.

Mr. *Swanston* and Mr. *Belt*, in opposition to the fifth exception.—The case of *Flight v. Robinson* (a) decides that communications between attorney and client, or counsel and client, anterior to the suit, and without reference to it, are not privileged. [The *Vice-Chancellor*.—Is that doctrine consistent with *Herring v. Cloberry* (b), and *Cromack v. Heathcote* (c)?] In those cases it seems to have been considered that all professional communications between attorney and client are privileged. But supposing the attorney can insist on the privilege to that extent for the benefit of his client, does it follow that the client himself has the same right? We submit that the privilege of the two are not co-extensive; and that the client must disclose communications made to his attorney, unless they have been made in contemplation of or pending a suit: *Preston v. Carr* (d), *Lord Walsingham v. Goodricke* (e), *Greenlaw v. King* (f). It is as right that the client should confess what he knows (whether he has communicated it to his solicitor or not), as that he should confess any other part of the case. Besides, there is a great difference between a man's own statement

(a) 8 Beav. 22.

(b) 1 Phill. 91.

(c) 2 Brod. & Bing. 4.

(d) 1 You. & J. 175.

(e) 3 Hare, 122.

(f) 1 Beav. 137.

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and that of his solicitor, who may not state the matter with exactness.

The *Vice-Chancellor*, at the close of this argument, expressed his opinion to be then in favour of the exception, but reserved judgment generally.

Mr. *Swanston* and Mr. *Belt* then argued against the sixth exception, that, as the cases and opinions inquired after had not been laid before counsel in contemplation of or pending the suit, they were not privileged: *Hughes v. Biddulph* (a), *Radcliffe v. Fursman* (b), *Bolton v. Corporation of Liverpool* (c), *Nias v. Northern and Eastern Railway Company* (d), *Knight v. Marquess of Waterford* (e), *Storey v. Lord George Lennox* (f), *Richards v. Jacson* (g).

Dec. 22nd.

The VICE-CHANCELLOR.—Since the argument upon the exceptions in this cause, I have considered not merely those on which I did not, but those also on which I did, express an opinion.

The argument touched, indeed more than touched, a general question of some importance, the question, namely, of the liability to compulsory disclosure, or exemption from disclosure, of confidential communications made to a solicitor professionally, or to a counsel professionally, where the communications related to rights of property merely,—were made by an individual not under any fiduciary obligation, nor having a community of right or of interest with any other person,—were made merely on the behalf of the consulting person singly, and were not made during a suit, during a dispute, or after the threat of a suit; the disclosure being sought adversely, not from the solicitor or counsel, but

(a) 4 Russ. 190.

(b) 2 Bro. P. C. 514, Toml.

ed.

(c) 1 Myl. & K. 88.

(d) 3 Myl. & Cr. 355.

(e) 2 You. & Coll. 22.

(f) 1 Myl. & Cr. 525, 685.

(g) 18 Ves. 472.

from the consulting person himself. Among the authorities mentioned with reference to this question were *Radcliffe v. Fursman*, in the House of Lords, and *Richards v. Jackson*, before Lord *Eldon*. These two authorities were contended to have established or recognised the liability of the consulting party to compulsory disclosure in a state of circumstances such in all respects as that which I have mentioned. If this is so, the liability must of course be taken to exist; but I must say that I am not nor have ever been satisfied that the two decisions were, as to the former by the House of Lords, or as to the latter by Lord *Eldon*, intended to establish or recognise such a liability in such circumstances.

Upon them, considering what the argument has been, it is, though perhaps not necessary, not, I think, quite out of place, that I should on the present occasion make some remarks, not forgetting that one is, for what it intended to decide, conclusive, and the other, for what it intended to decide, all but conclusive. Instances may without much difficulty be suggested of persons consulting solicitors or laying cases before counsel upon particular subjects being so circumstanced, being in such positions with respect to those subjects, as to be disabled (whatever their secret views or private intentions) from saying that they did so on their own behalf solely, or on account of their own interests merely. Is it improbable that the House of Lords, in deciding *Radcliffe v. Fursman*, considered Mr. Radcliffe as in such a situation with regard to the case of the contents of which he demurred to the discovery? Nothing turns probably, as far as the House of Lords is concerned, on that part of Lord *King's* decision which was in favour of Mr. Radcliffe, for there was not a cross appeal. He was trustee of the bonds for the respondent, and was, as his mother's executor, the trustee of the term by which the money, if any, due on the bonds, was secured. The point decided having been decided on a demurrer, is it too much to say that the right inference from the statements in the bill

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was, that the case stated for the opinion of counsel was one as to which it was not competent to the appellant to contend that it had been stated on his own behalf alone or on account of his own interest alone? The question alleged to have been put to the counsel seems to have been as to the respondent's right,—seems to have been in effect whether the appellant, as her trustee, had for her benefit a valid claim against himself in his private right. Much stress ought, I agree, not to be laid on the reasons to be found in appeal papers,—they may serve to shew, however, what probably were the points argued, and in this instance one of the respondent's reasons was thus: "For that the statement of the said case was in an affair wherein the appellant was not merely concerned in his own right, but was and still is a trustee for the respondent of the said bonds, and a trustee of the estates which are liable to pay the same." The respondent's appeal case, I may observe too in passing, contains this remark: "Note, the bill nowhere requires any discovery of the counsel's opinion."

To this appeal, Lord *Hardwicke*, who had been one of Mr. Radcliffe's counsel, referred, as we know, in *Stanhope v. Roberts* (a), where, independently of the submission of the defendant, who had a double character, the plaintiff had or may have had a common right and interest in the draft ordered to be produced. The report in *Athyns* certainly does not induce me to take a view of *Radcliffe v. Fursman* different from that which I should otherwise have taken. With regard to *Richards v. Jacson* (b), Mr. *Vesey's* report does not notice the argument or mention any one counsel concerned in it, and the judgment ascribed to Lord *Eldon* is given *ex relatione*;—it is not said of whom. I am unable, therefore, to read it with that trust in its correctness with which in general this estimable and valuable reporter's accounts of Lord *Eldon's* judgments are justly read. Nor

(a) 2 Atk. 214.

(b) 18 Ves. 472.

certainly am I satisfied that his Lordship treated or understood the decision of the House of Lords in *Radcliffe v. Fursman*, as recognising or establishing the proposition that if a man, with relation to his own private interests merely, upon a point on which he owes not any fiduciary duty to another, lays a statement before counsel for his advice professionally, he may be compelled afterwards to disclose it if there was at the time neither suit nor dispute existing.

Certainly, the demurrer in *Richards v. Jacson* was overruled, though the order was not, I believe, drawn up. The cause, as I am informed, was, after exceptions taken to the answer, settled by arrangement. The brief held by Sir *Samuel Romilly*, the defendant's leading counsel, has been lent me by the solicitors who instructed him, and it appears to state the bill and the demurrer and answer with sufficient fulness.

The demurrer was in these terms:—"The defendants, by protestation, not confessing or acknowledging all or any of the matters in plaintiff's said bill, the discovery of which is hereafter demurred to, to be true, in such sort, manner, and form as the same are thereby set forth and alleged, as to such part and so much of the said bill as seeks the defendants to discover and set forth whether there are not now, or lately, and when last were not in the possession or power of the defendants, or either and which of them, the case or cases in the bill mentioned, which such bill alleged was or were laid before counsel in respect of the matters therein mentioned, and the opinions thereon, or drafts or copies thereof, and which require the defendants to set forth a list thereof, and to produce and leave the same in the hands of their clerk in court in this cause, for the usual purposes; and if the same are not in the possession or power of the defendants, or either of them, that defendants may set forth what is become thereof, and in whose possession or power the same are, or lately and when last were, defendants do demur in law, and for cause of demurrer shew, that the

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plaintiff hath not, in and by his said bill, made or stated such a case as doth or ought to entitle him to any such discovery as aforesaid from or against the defendants, or either of them; and humbly demand the judgment of this Court whether they ought to be compelled to make any further or other answer than as aforesaid to such part of the said bill as they have so demurred unto."

Now, it is remarkable that the bill contains the following passages not covered by the demurrer:—"And the said William Massey caused some case or cases to be prepared and laid before some counsel for his or their opinion as to his proceedings against plaintiff touching the said accounts, in which he stated the several matters which had taken place between him and the plaintiff, and the dealings and transactions between them, and the manner in which the said co-partnership business had been conducted; and the pretended errors in such accounts, or many of such matters. And the said William Massey was advised that he could not impeach said settled accounts, and he therefore never attempted so to do; but the said William Massey being now dead, whereby the plaintiff is unable to obtain from him a full discovery of the said pretended errors, the said Roger Jacson and Philip Humberstone have filed such bill against the plaintiff as aforesaid, and have replied to the answers of plaintiff, and are proceeding to the hearing of the said cause; and there are, or lately were, in the possession or power of the said Roger Jacson and Philip Humberstone, or one of them, the books of accounts of the said co-partnership between the plaintiff and the said William Massey, and various other books, accounts, books of account, letters, copies of letters, papers and writings, relating to the dealings and transactions between the plaintiff and the said William Massey, and to the other matters aforesaid, and particularly to the examination which was made by or under the direction of the said William Massey, of the accounts of the said co-partnership, about or after the said

months of June or July, 1794, and the supposed errors which were above pointed out, and lists or accounts of such errors which were then made out, or drafts or copies thereof, and the case or cases which was or were laid before counsel in respect thereof, and the opinions thereon, or drafts, or copies thereof, but said defendants refuse to produce the same, or to set forth what has become thereof; and they have lately burned or destroyed many of them; and they know who were the persons who were employed by the said William Massey to examine the said accounts, and who can testify many things relating thereto, but they refuse to set forth their names and places of abode."

And the bill contains these questions:—"Whether the said William Massey did not cause some and what cases to be prepared and laid before some and what counsel, for his or their opinion as to his proceedings against the plaintiff touching the said accounts; and whether he did not state such several matters which had taken place between him and the said plaintiff, and the dealings and transactions between them, and the manner in which the said co-partnership business had been conducted, and the pretended errors in the said accounts, or many of such matters; and whether the said William Massey was advised that he could not impeach the said settled accounts; and whether he ever, and when, attempted to do so," and so on.

I give no opinion whether, as the rules and course of the Court were then understood, the demurrer was or was not in effect overruled by what the defendants had thus submitted to answer. They had submitted to answer whether Massey did not cause some and what cases, &c.

But passing by any such consideration, we must remember that Massey had been the plaintiff's partner, and that the case laid before counsel related to partnership transactions and the partnership accounts. Now, a partnership and the mutual duties of partners continue to subsist for some purposes after a dissolution, and perhaps (of course I do not

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assert it, but perhaps) Lord *Eldon* thought it impossible for those who represented Massey to be heard to say that a case laid by him before counsel on such a subject was on his sole behalf, distinctly and separately from Richards. The ground upon which his Lordship, in the case of the *Attorney-General v. Berkeley* (a), in 1820, directed the production of an opinion of counsel, is, in this point of view, striking, when the language of the answer as given in the report is considered.

If, in *Radcliffe v. Fursman* and *Richards v. Jacson*, there were facts or stated facts sufficient to deprive Mr. Radcliffe in one instance, and Mr. Massey in the other, of the right to say, for any effectual purpose, that he consulted counsel, upon the subject on which he did consult counsel, on his sole and exclusive behalf, for his single and separate interest, and the decision of the House of Lords and that of Lord *Eldon* may be viewed as founded on that ground, I suppose, that they rule no more in substance and effect as to the cases there in question, than was in the *Attorney-General v. Berkeley* decided as to the opinion, and that it would be wrong in every sense to suggest that they are anomalous, or not founded on correct principles; and if, on the other hand, they ought to be viewed as deciding that a man may be compelled to discover to his adversaries a case as to which he is entitled to say that he laid it before counsel confidentially for professional advice on his own behalf solely, for his own interest alone, upon a subject with reference to which he was not under any fiduciary obligation, and as to which a suit or dispute, though not actually commenced or threatened, was apprehended by him as possible to be commenced or arise thereafter, then, from the plain necessity of conforming judicially to the judgments of the House of Lords, my respect, independent of that necessity, for their judgments, and the

(a) 2 Jac. & W. 291.

deference and reverence for Lord *Eldon*, which, I hope, are not felt more strongly by any man than by myself, I must endeavour to think that those two decisions are still not opposed to any principle of English law or general jurisprudence, though there will, I acknowledge, be some difficulty in the task.

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That cases laid before counsel on behalf of a client stand upon the same footing as other professional communications from the client to the counsel and solicitor, or to either of them, may, I suppose, be assumed; and that, as far as any discovery by the solicitor or counsel is concerned, the question of the existence or non-existence of any suit, claim, or dispute, is immaterial, the law providing for the client's protection in each state of circumstances, and in each equally, is, I suppose, not a disputable point. I suppose *Cromack v. Heathcote* (a) to be now universally acceded to, and the doctrine of this Court to have been correctly stated by Lord *Lyndhurst*, in *Herring v. Cloberry* (b), when he said, "I lay down this rule with reference to this cause, that, where an attorney is employed by a client professionally to transact professional business, all the communications that pass between the client and the attorney in the course and for the purpose of that business are privileged communications, and that the privilege is the privilege of the client and not of the attorney."

This I take to be not a peculiar, but a general rule of jurisprudence. The civil law, indeed, considered the advocate and client so identified or bound together, that the advocate was, I believe, generally not allowed to be a witness for the client. "*Ne patroni in causâ, cui patrocinium præstiterunt, testimonium dicant*," says the Digest (c). An old jurist, indeed, appears to have thought, that, by put-

(a) 2 Brod. & Bing. 4.

(b) 1 Phill. 91.

(c) Dig. lib. 22, tit. 5, l. 25.

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ting an advocate to the torture, he might be made a good witness for his client; but this seems not to have met with general approbation. Professors of the law probably were not disposed to encourage the dogma practically. *Voet* puts the communications between a client and an advocate on the footing of those between a penitent and his priest. He says: "*Non etiam advocatus aut procurator in eâ causâ, cui patrocinium præstitit aut procuracionem, idoneus testis est, sive pro cliente sive contra eum producatur; saltem non ad id, ut pandere cogeretur ea, quæ non aliunde quam ex revelatione clientis, comperta habet: eo modo, quo, et sacerdoti revelare ea quæ ex auriculari didicit confessione, nefas est.*"

Now, whether laying or not laying stress on the observations made by the late Lord Chief Baron in *Knight v. Lord Waterford* (a),—observations, I need not say, well worthy of attention,—I confess myself at a loss to perceive any substantial difference in point of reason, or principle, or convenience, between the liability of the client and that of his counsel or solicitor to disclose the client's communications made in confidence professionally to either. True, the client is or may be compellable to disclose all that, before he consulted the counsel or solicitor, he knew, believed, or had seen or heard; but the question is not, I apprehend, one as to the greater or less probability of more or less damage. The question is, I suppose, one of principle,—one that ought to be decided according to certain rules of jurisprudence; nor is the exemption of the solicitor or counsel from compulsory discovery confined to advice given or opinions stated. It extends to facts communicated by the client. Lord *Eldon* has said (b): "The case might easily be put, that a most honest man, so changing his situation, might communicate a fact, appearing to him to have no connection with the case, and yet the whole title of his former client might depend on it. Though Sir *John*

(a) 2 Y. & C. 40, 41.

(b) 19 Ves. 267.

Strange's opinion was, that an attorney might, if he pleased, give evidence of his client's secrets, I take it to be clear, that no Court would permit him to give such evidence, or would have any difficulty, if a solicitor, voluntarily changing his situation, was, in his new character, proceeding to communicate a material fact. A short way of preventing him would be by striking him off the roll."

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But as to damage: a man, having laid a case before counsel, may die, leaving all the rest of mankind ignorant of a blot on his title stated in the case, and not discoverable by any other means. The whole fortunes of his family may turn on the question whether the case shall be discovered, may be subverted by its discovery.

Again, the client is certainly exempted from liability to discover communications between himself and his counsel or solicitor after litigation commenced, or after the commencement of a dispute ending in litigation; at least, if they relate to the dispute or matter in dispute. Upon this I need scarcely refer to a class of authorities to which *Hughes v. Biddulph* (a), *Nias v. Northern and Eastern Railway Company* (b), before the present Lord Chancellor in his former Chancellorship, and *Holmes v. Baddeley* (c), decided by Lord *Lyndhurst*, belong.

But what, for the purpose of discovery, is the distinction in point of reason, or principle, or justice, or convenience, between such communications and those which differ from them only in this, that they precede instead of following the actual arising, not of a cause for dispute, but of a dispute, I have never hitherto been able to perceive.

A man is in possession of an estate as owner, he is not under any fiduciary obligation, he finds a flaw, or a supposed flaw, in his title, which it is not, in point of law or equity, his duty to disclose to any person; he believes that the flaw or supposed defect is not known to the only per-

(a) 4 Russ. 190.

(b) 3 Myl. & Cr. 355.

(c) 1 Phill. 476.

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son, who, if it is a defect, is entitled to take advantage of it, but that this person may probably or possibly soon hear of it, and then institute a suit or make a claim. Under this apprehension he consults a solicitor, and, through the solicitor, lays a case before counsel on the subject, and receives his opinion. Some time afterwards the apprehended adversary becomes an actual adversary, for, coming to the knowledge of the defect or supposed flaw in the title, he makes a claim, and after a preliminary correspondence, commences a suit in equity to enforce it: but between the commencement of the correspondence and the actual institution of the suit the man in possession again consults a solicitor, and through him again lays a case before counsel.

According to the respondent's argument before me on this occasion, the defendant, in the instance that I have supposed, is as clearly bound to disclose the first consultation and the first case, as he is clearly exempted from discovering the second consultation, and the second case. I have, I repeat, yet to learn, that such a distinction has any foundation in reason or convenience.

The discovery and vindication and establishment of truth are main purposes certainly of the existence of courts of justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination, nor probably would the purpose of the mere disclosure of truth have been otherwise than advanced by a refusal on the part of the Lord Chancellor in 1815 to act against the solicitor, who, in the cause between Lord *Cholmondeley* and Lord *Clinton*, had acted or proposed to act in the manner which Lord *Eldon* thought it right to prohibit. Truth, like all other good things, may be loved unwisely—may be pursued too

keenly—may cost too much. And surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, and suspicion, and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself.

However, I need not say that if any rule has been established by a decision of the House of Lords, or by a series of decisions in the Court of Chancery, that rule I have not the least intention or notion of contravening or infringing.

Upon the present occasion, my view of the right course to be taken is to direct in effect, not that any of the interrogatories should not be answered at all, but that some of them should not be answered now.

The dispute here is not with a witness, and, being with a party, is not upon the validity or invalidity of a plea or demurrer, or upon the sufficiency or insufficiency of an answer or examination, or upon a question in the ordinary form, whether a defendant shall be ordered to produce a document in his possession or power. The contest is in the Master's office, between a vendor and purchaser. It must be borne in mind that the discovery sought is of matters anterior to the contract, and concerns the question of title only; and that, in order to obtain the production upon oath by the vendor (the exceptant) of such documents as he ought to produce, it may well be that not a single interrogatory may be necessary. And my opinion is, that, as to some portions at least of the interrogatories before me, it is only upon a special case, if at all, that, as between parties standing in the relative positions and in the circumstances in which the parties here stand, they ought to be allowed. But I am not aware of any such special case having yet been made.

In an early year of my professional life, I had to support

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before Mr. *Harvey*, a Master of great knowledge and experience, a set of interrogatories for the examination in his office of a party (not a witness), which were relevant certainly, but special; Mr. *Harvey* decided not to approve of them in that stage at least, because, though they were relevant, and might thereafter appear proper on a special case being made, a special case had not then been made for their reception. I urged that, in a bill raising the issues which were before him (a bill not supported by oath), there might properly be contained statements upon which there might correctly be founded interrogatories in the bill to the same effect as those before him, and that they must be answered. Mr. *Harvey* agreed to that, but said that, whether theoretically the analogy was perfect or imperfect, it was not recognised by the practice of the Master's office, and he cut the interrogatories down to a very simple and meagre form. I thought this at the time sufficiently rigid, but it was, I believe, submitted to.

It may be suggested that, if this is a right rule, I ought to allow all the exceptions. I am not quite sure that this is not so. But my error so far, if any, will, I think, be harmless certainly, and I am content to bear my valued friend, Mr. *Lynch*, company for a certain distance, not forgetting, when I part from him, that he is a person whose judgment of the right way is as likely to be correct as mine.

I consider that the right order will be to pass over the first exception, to overrule the third and fourth, and to allow the rest, but to allow them, expressly, without prejudice to any proceedings that may be taken before the Master under that part of the order of the 22nd of December, 1845, which directs the exceptant and all other parties to produce before the Master, upon oath, all deeds, books, papers, and writings in their custody or power relating to the matters in the order mentioned, as the Master shall direct; and without prejudice to the question, whether, after that part of the order shall have been fully proceeded upon,

and after Mr. Westron shall have answered the present interrogatories so far as the Court does not decide that they are not now to be answered, fresh interrogatories shall be administered to him, comprising the whole or any part of the matters which the Court directs not at present to stand in the interrogatories. I think that the deposit should be returned to the exceptant without prejudice to any question, and that the consideration of each party's costs of the exceptions should be reserved. My decision, therefore, is only (I repeat) that certain passages are not now to be in the interrogatories, leaving open and untouched the question whether, hereafter, the exceptant may not be liable to have passages of a similar import inserted in future interrogatories for his examination.

In conclusion, I may perhaps be permitted to observe that having, while considering these exceptions, as well as before, for the purpose of a very different case, *Combe v. The City of London* (a), looked at many, if not all, of the judicial opinions that are reported as having, from time to time, during the last twenty-five years, been pronounced in our courts of equity as to the circumstances in which, and the extent to which, a suitor can enforce against his adversary a discovery of documents, I was then and have now been much struck with their number and variety. This *aliarum super alias acervatarum sententiarum cumulus*, during a period at once so short and so modern, is remarkable, surely, when the nature and character of the subject are considered in connection with the length of time during which a system of equitable jurisprudence has been established in this country.

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(a) 1 Y. & C. C. C. 631.

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Nov. 16th,
17th.

NAYLOR v. SOUTH DEVON RAILWAY COMPANY.

Construction of
a railway act as
to the forfeiture
of interest on
shares upon
which the calls
were not all
paid up.

BY the 35th section of the statute by which the South Devon Railway Company is constituted, it is enacted that the directors may, until the completion and opening of the railway, pay interest not exceeding *£5 per cent. per annum* on every share from the day of payment of the calls; such interest to accrue and be paid at such times and places as the directors shall appoint; provided that no interest shall accrue to the proprietor of any shares upon which any call shall be in arrear in respect of such shares, or of any other share held by the same proprietor during such time as such call shall remain unpaid.

In and before January, 1846, the plaintiff held 401 shares in the Company, and had paid all the calls on those shares up to that month, amounting to *£10,025*; and by an order of the directors, made in pursuance of the statute, she was entitled to interest on those calls.

In January, 1846, further calls of *£10 per share* were made on the shares: but the plaintiff neglected to pay those calls.

In the following April the directors sent to the plaintiff a warrant for interest on the *£10,025* up to January only.

The plaintiff then offered to pay up all the last calls, with *£5 per cent.* interest to April, upon condition of being allowed interest to April, (amounting to *£205*), on the *£10,025*. The directors, however, refused to allow interest on the *£10,025* during the period of time before mentioned, and threatened to declare the shares forfeited if the last calls were not paid up unconditionally.

The bill prayed an injunction against the directors, to restrain them from declaring a forfeiture and proceeding to a sale of the shares.

Mr. *Wigram* and Mr. *Stevens*, for the plaintiff, in moving for an injunction according to the prayer of the bill, contended, that the word “accrue,” in the 35th section, meant “become payable.”

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Mr. *Russell* and Mr. *Chandless*, *contrà*, were stopped by the Court.

The VICE-CHANCELLOR.—I am sorry to say, that, according to my present notion, the plaintiff must lose the £205 ; but I do not say that I shall decline allowing her to take the opinion of a court of law upon the point.

On the following day, *Wigram* asked for a case for the opinion of a court of law. Nov. 17th.

The VICE-CHANCELLOR expressed a doubt whether, at this stage of the cause, it would be regular to grant a case without the consent of the defendants.

The defendants, by their counsel, refused to consent.

ORDERED, that the plaintiff do, within one week, pay the sum of £205 to the defendants, without prejudice to any question in the cause : the motion to stand over until the hearing or further order, with liberty to apply.

1846.

Dec. 8th.

FINCH v. SECKER.

Upon the construction of a will and codicil, *Held*, that a substituted executor was not entitled to a legacy of £100, given by the will to the original executor for his trouble in the execution of it.

MARY FIELD, by her will, dated the 8th of March, 1841, devised and bequeathed all her real and personal estate to John Secker and Robert Mason, their heirs, executors, administrators, and assigns, upon certain trusts for the benefit of her niece, Mary Finch, and others; and the testatrix appointed the said John Secker and Robert Mason joint executors of her will, and gave and bequeathed to them the sum of £100 each, as an acknowledgment of the trouble they would have in the execution of the trusts thereof.

By a codicil, dated the 16th of April, 1842, the testatrix revoked the appointment of Robert Mason, as one of the trustees and executors of her will; and also revoked and made void all and every the devises, bequests, trusts, powers, and authorities thereby given to and reposed in him, jointly with the said John Secker, as the trustees and executors of her said will, or otherwise howsoever; and in his place the testatrix appointed James Bedingfield Bryan to be a trustee and executor of her will conjointly with the said John Secker. And the testatrix declared, that all the devises, bequests, trusts, powers, and authorities given to and reposed in the said Robert Mason, jointly with the said John Secker, by the said will, should go to, devolve on, and be vested in the said James Bedingfield Bryan, his heirs, executors, and administrators, conjointly with the said John Secker, his heirs, executors, and administrators, in such and the same manner, as if he, the said James Bedingfield Bryan, had been originally named in her said will a trustee and executor thereof, instead of the said Robert Mason; but, nevertheless, upon the like trusts, and for the same ends, intents, and purposes, and on the same terms and conditions, as were expressed and contained concerning the same in and by her will.

The question was, whether Bryan, the executor and trustee substituted for Mason, was entitled to the legacy of £100; or whether the gift to Mason was intended exclusively as a benefit to him.

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Mr. *Cooper* and Mr. *Hall*, for the plaintiffs.

Mr. *Bacon* and Mr. *Hubback*, for the defendants the executors, contended that the gift of £100 to Mason was in his character of executor; and consequently that Bryan, as substituted executor, was entitled to it.

Mr. *Collyer* and Mr. *Sidney Smith* appeared for the other defendants.

The VICE-CHANCELLOR.—The testatrix declares that the bequests that were made to Mason jointly with Secker shall go to Bryan jointly with Secker; but she says nothing about the bequest made to Mason separately. She bequeathed the £100 to each of her executors for their trouble. It is probable that a gift of £100 to Bryan was what the testatrix would have willed, if the question had been brought to her attention; but she has not willed it; I am sorry to state my opinion to be, that Bryan is not entitled to the legacy in question. It may, however, be worth Mr. Bryan's while to make his claim in the Master's office. The Master may come to a different conclusion, and may induce me to do the same at some future stage of the cause.

1846.

Nov. 26th.

WROUGHTON v. COLQUHOUN.

Upon the construction of a will, *Held*, that an annuity was charged upon the capital as well as upon the income of the testator's estate.

LIEUT.-COL. WILLIAMSON, by his will, after directing payment of his funeral and all other just expenses, bequeathed and devised all his property as follows:—All his goods and chattels to be sold to the best advantage, and converted into money: he bequeathed the sum of £260 sterling *per annum* to Mrs. Charlotte Clarke (his housekeeper during his illness) during the term of her life; and the remaining interest of his money he gave to Captain R. Wroughton, or, in the event of his demise, to Mrs. S. Wroughton, his wife; and in the event of the death of one of these parties, the principal to go to their children, or in the event of their having no children, to some charitable institution, as his executors might select.

The question was, whether, in the event of the interest of the property being insufficient to pay the annuity, the annuitant, Mrs. Clarke, was entitled to receive the difference out of the capital.

Mr. *Wigram* and Mr. *Bilton* appeared on behalf of the annuitant.

Mr. *Cooper*, Mr. *Russell*, Mr. *Malins*, Mr. *Toller*, Mr. *Briggs*, and Mr. *Walford*, appeared for the other parties.

The following cases were cited:—*Baines v. Dixon* (a); *Phillips v. Phillips* (b); *Taylor v. Emerson* (c); *Foster v. Smith* (d).

The VICE-CHANCELLOR (e). — The decision of Lord

(a) 1 Vez. sen. 41.

(b) 8 Beav. 193.

(c) 4 Dr. & W. 117.

(d) 2 Y. & C. C. C. 193; 1

Phill. 629.

(e) *Ex relatione*, Mr. *J. H. Cooke*.

1846.

Dec. 4th.

Upon the construction of an instrument creating a power of raising portions, *Held*, that the donee had a right to distribute the portions unequally.

COTGREAVE v. COTGREAVE.

THOMAS COTGREAVE, by his will, dated the 8th of January, 1790, devised all his freehold hereditaments to Sir John Cunliff and John Hignatt, and their heirs, to certain uses, some of which were to John Johnson, (afterwards Sir John Cotgreave), and William Johnson, for their respective lives. In the will was a power to each of these two tenants for life, when they respectively should be in possession of all or any part of the said premises so to them limited, for their respective lives, (and in case they, or either of them, should have issue of their respective bodies an eldest son, and one or more younger son or sons, or a daughter or daughters), by any deed or deeds, or will or wills, in writing, to be executed by them as therein mentioned, to charge all and singular the said premises so to them limited for their respective lives as aforesaid, by way of mortgage, for any term or number of years or otherwise, with any sum or sums of money, not exceeding in the whole the sum of £2000, for each of them the said John Johnson and William Johnson, for the portion or portions of any daughters or younger sons of them the said John Johnson and William Johnson, other than an eldest or only son or sons of their respective bodies, to be paid to such daughters or younger sons respectively at such time or times, and with lawful interest, or any lower interest for the same in the meantime, for or towards the maintenance and education of such daughters or younger sons respectively, as the said John Johnson and William Johnson respectively, by such their respective deed or deeds, or last wills and testaments, should direct, limit, or appoint; so, nevertheless, that the person or persons who should for the time being be entitled to the possession of the said premises under or by virtue of the trusts of the said will, should, during their respective lives, keep down the interest of such

Lyndhurst in the case of *Foster v. Smith*, on the appeal from my judgment, proceeded upon a different will from the present. But if it had appeared to me that a decision of that noble and learned lord had proceeded upon a principle involving a decision against this will, I should not hesitate in following his opinion in preference to my own; although I must say, with great deference and respect, that my opinion, pronounced in *Foster v. Smith*, remains as it was. I need not say that his Lordship's conclusion is more likely to be correct than my own. But I think that the decision of Lord *Lyndhurst* in *Foster v. Smith* did not proceed upon any principle an adherence to which requires an adjudication in the present case against the annuitant. It seems to be agreed, in the first place, that, to restrict the annuitant to the income during her life would involve the postponement, to a certain extent, of her bequest, to the other legatees; for which I do not see any sufficient ground. In the next place, the annuity is given to the annuitant in words from which, if nothing had been added to them, it is plain that she would have a charge upon the capital of the estate, as well as upon the income. The intention, so clearly expressed, ought, in order to be displaced, to be met by an indication of a different intention equally unambiguous. I am of opinion that the language from which a different intention is sought to be implied, does not, unambiguously, exhibit that intention. In my opinion, the just interpretation of this will requires that the annuitant shall be held to have a charge in respect of her annuity upon the capital of the estate, and not merely upon the income. The Court, therefore, (at the request of all parties to the record that the construction should be declared at this stage of the cause), declares this to be the true construction of the will.

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The VICE-CHANCELLOR, after observing that the deeds were executed before the stat. 11 *Geo.* 4 & 1 *Will.* 4, c. 46, said, that he had no doubt that under this particular instrument the distribution in unequal shares was within the settlor's power; and that he was entitled to direct the whole £2000 to be raised, and also to distribute it unequally.



Jan. 21st,
26th, 28th.

SHIELDS v. BOUCHER.

Discussion of the principles upon which hearsay evidence is admissible in cases of pedigree.

Quere, whether the reasons and grounds upon which births and times of births, marriages, deaths, legitimacy, consanguinity, &c. are allowed to be proved by hearsay (from proper quarters) in a controversy merely genealogical, are not applicable to declarations made by a deceased person as to where his family came from, where he came from, or "of what place" his father was designated.

THE bill was filed by J. Shields and Hester, his wife, as entitled in right of the wife to the personal property of her mother, Elizabeth Allen, against William Boucher, who was the administrator of Richard Hollins, of Wolverley, in the county of Worcester, praying for an account of Richard Hollins's personal estate, and for payment of the surplus thereof, after payment of his debts, to the plaintiffs. The bill proceeded on the ground that Mrs. Shields' mother, Elizabeth Allen, was first cousin of the intestate Richard Hollins, and his only next of kin, under the statute of distributions, living at his death.

The defendant had procured letters of administration of the intestate's effects, as being sole next of kin and a cousin of the intestate, and he denied by his answer that until within a few months he was aware of the existence of the plaintiffs, or of any of the circumstances relating to Elizabeth Allen. According to the plaintiffs' case, the defendant was a first cousin once removed of the intestate, being a nephew of Elizabeth Allen; and with respect to Elizabeth Allen, their representation was, that she was one of

Where, upon the trial of an issue, the evidence of a material witness, being uncorroborated and being in other respects unsatisfactory, has been discredited by the judge, and the jury have given a verdict against the party producing that witness, this Court, upon being satisfied, by affidavits filed since the trial, that the evidence of the witness may be substantially corroborated, will grant a new trial.

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lowing circumstances took place at the trial:—On the part of the plaintiffs a witness was asked—"Have you heard Elizabeth Allen say what was her maiden name?" Question objected to, and objection overruled. Answer: "She said her maiden name was Hollins." Question: "Have you heard her say where her family came from?" Objected to and objection allowed. "Have you heard her say where she came from?" Objected to, and objection allowed. It was then proposed to ask the witness—"Have you heard her say where she was married?" Not allowed. "Have you heard her say what her father's name was?" Answer: "She said her father was John Hollins." It was then proposed to ask—"Of what place?" Not allowed. Have you heard her say what her father was? Allowed. Samuel Allen, the great-nephew of Mrs. Allen's husband, was then asked this question: "Have you ever heard your father say whom his uncle married?" Answer: "Miss Hollins." Question: "Did you ever hear him say of where?" Objected to, and objection allowed.

As to the learned Judge's remarks upon the testimony of Samuel Shields, it appeared that this witness deposed to a journey which he had made for the express purpose of acquainting the intestate Richard Hollins with Elizabeth Allen's relationship to the intestate's family, and to a long interview which he had had with the intestate on the subject. His evidence, however, was uncorroborated by other evidence, and was, particularly as to the places which he passed on his route, and as to the particulars of the interview, considered by the learned Judge as vague and improbable, and his Lordship made observations to that effect to the jury. He also remarked upon the near relationship between this witness and the plaintiffs.

Since the trial, affidavits had been made by two persons named Coxford, which in some degree corroborated the testimony of Samuel Shields; and one point now discussed

was, whether these affidavits could be used in support of the motion.

Other points, particularly as to the manner of trying the second issue in the cause, are noticed in the judgment, and need not be stated here.

Mr. Serjt. *Talfourd*, Mr. *Wigram*, and Mr. *Stevens*, in support of the motion, contended that Mrs. Allen's declarations as to the place from which her family came, and the place from which she came, were admissible to shew the existence of a tradition in the family that she had relations in that place, and that such declarations might be connected with evidence proving that persons bearing her name lived in that place: *Doe d. Johnson v. The Earl of Pembroke* (a), *Davies v. Lowndes* (b), *Kidney v. Cockburn* (c), *Rishton v. Nesbitt* (d), *Rex v. Inhabitants of Erith* (e). Also, that the questions "of what place," and "of where," were legitimate questions with a view to prove the identity of John Hollins, and that they were equally allowable for that purpose as the question what Mrs. Allen's father was, which had been allowed: *Hood v. Lady Beauchamp* (f), *Hennell v. Lyon* (g), *Hemmings v. Smith* (h).

The *Attorney-General*, (with him, Mr. *Russell*, Mr. *Stinton*, and Mr. *Cleasby*), for the defendant.—It may be assumed that there was a John Hollins of Kinver, and that he had a daughter named Elizabeth. There is no evidence, however, that Elizabeth Allen, the person who was married at Bloomsbury, was that daughter. At all events, all the evi-

(a) 11 East, 504.

(b) 6 Man. & Gr. 471.

(c) 2 Russ. & M. 167.

(d) 2 Mood. & Rob. 554.

(e) 8 East, 539.

(f) Hubback on Succession, 468; 8 Sim. 26.

(g) 1 B. & Ald. 182.

(h) 4 Dougl. 33.

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dence relating to her birth, marriage, and burial was left to the jury; they decided against the plaintiffs; and the learned Judge was satisfied with their verdict. It is contended, however, that her declarations as to her family ought to have been received.

Upon that, the first question is, whether the declarant, Elizabeth Allen, was in that position in the family, that she could make a receivable declaration. Admitting that you prove that Elizabeth Allen was the mother of Mrs. Shields, how does that give the plaintiffs the means of proving by Mrs. Allen's declaration who was her father and mother? The declaration must be by a person who is proved *aliunde* to be a member of the family: *Attorney-General v. Monckton* (a). If Elizabeth Allen had been the plaintiff, she would have been without evidence on the point. Essentially, the present plaintiffs are in the same position. In *Doe d. Tilman v. Tarver* (b), it was ruled that the declaration of a person *ante litem motam* may avail, though afterwards the claimant may succeed in his claim through the party making the declaration. But can the claimant himself make the declaration? The objection is, not whether the party might by possibility succeed, but whether the party can be at one and the same time declarant and plaintiff.

The next point is, whether the questions put and disallowed were legitimate; and it is submitted they were not. An answer to the substantive question "of what place" would convey evidence of a positive fact, and not of a mere designation or description. It may, perhaps, be conceded that such a question might, from necessity, be put in the case of a Welsh pedigree; but not in ordinary cases. If to the question, "Did she say who her father was?" the answer had been "John Hollins, of Kinver," the evidence might have been admissible. If the name of the place had

(a) 2 Russ. & M. 147.

(b) Ryan & M. 141.

been comprised in the description, and the place had been known by the family as part of the description, that case would have been distinguishable from the present. The objection here is, that there is a separate declaration as to the place. The same observations apply to the questions as to "where the family come from," &c. If you ask these questions, you may ask anything leading to the same conclusion—as, "Did she say where her father was at school?" &c. In the case of *Rishton v. Nesbitt*, the most favourable authority for the plaintiffs, the declaration was, that the party was going to see his relations. That was a declaration accompanying his act of departure, and was clearly admissible.—He then addressed himself to the other parts of the case.

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Mr. Serjt. *Talfourd*, in the course of his reply, said that the objection, that the plaintiffs had not shewn *aliunde* that Mrs. Allen was related to the Hollinses, had been made at the trial and overruled. Upon the admissibility of the rejected evidence, he relied on *Hood v. Lady Beauchamp*, which, he said, had not been answered on the other side. He also referred to *Head v. Head (a)*, and *May v. Selby (b)*.

In the course of the argument, some discussion took place as to whether the observations of counsel should be confined to the questions that were actually put to the witnesses, or be extended to those which were submitted to the Judge for his opinion as to their admissibility. It seemed to be agreed that the former only should be the subject of argument.

The *Vice-Chancellor* stated the questions which, in his opinion, had been put to the witnesses, and disallowed (c).

(a) 3 Atk. 511. (b) 4 Scott, N. R. 727. (c) See *post*, p. 52.

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The VICE-CHANCELLOR.—This motion for a new trial, upon which, in addition to the report of the learned Lord Chief Justice of the Court of Common Pleas, before whom the trial that has been had took place, I have, with the assent of each party, had supplied to me a shorthand writer's notes of the entire proceedings, arose thus:—The plaintiff, Mrs. Shields, is the daughter and administratrix of Elizabeth Allen, widow, who, in the year, 1840, died in London, or its immediate neighbourhood. A man named Richard Hollins, of Wolverley, in Worcestershire, died there intestate in the same year, but before the death of Mrs. Allen.

Of this Richard Hollins, the defendant is the administrator, and alleges himself, probably with truth, to be the first cousin once removed.

The defendant contending, also, that he was the sole next of kin of Richard Hollins at his death, this suit was instituted in right of the plaintiff, Mrs. Shields, as the personal representative of her mother, for the administration of Richard Hollins's personal estate upon the alleged title that he left Elizabeth Allen his sole next of kin at his death. She was, as the plaintiffs allege, the intestate's cousin-german, that is, the daughter of his paternal uncle, John Hollins, of whom the defendant alleges that he is the grandson, but the defendant rejects the aunt thus ascribed to him. He denies, and appears never to have admitted, her relationship. The nature of the controversy seems to render some consideration of her alleged history not immaterial.

It appears that she lived to a great age. Indeed, she was married so long ago as the early part of the year 1769. Her maiden name was Elizabeth Hollins. Her husband was a jeweller, probably a working jeweller. The plaintiffs,—whose theory is, that she was the daughter of a family of substantial yeomanry, or small gentry, settled at Kinver, in Staffordshire, where, as they say, she was born, or at least baptized, in 1748—assert that her marriage was an unequal marriage; that it was below her family's expec-

tations and against their wishes; that she and her family ceased to communicate with each other; that, losing her husband within twenty or twenty-five years of her marriage, she passed many years, that is, more than the latter half of her long life, in poverty or narrow circumstances.

It is, indeed, certain or probable that she became a widow many years before her death, and that she did pass at least much of the latter part of her life in obscurity and humble circumstances; but a letter of hers is in evidence, from which I think it a reasonable inference, (considering what period of the world it was when she was young), that she had received an education which it is not likely that she would have received if born and bred in the station or condition in which she appears during the decline of her life to have been.

Richard Hollins, the intestate, who was, I believe, baptized in 1768, at Kinver, already mentioned, as his father had been in 1726, seems to have been a substantial yeoman, or small country gentleman, who very possibly passed the whole of his life in the counties of Stafford and Worcester. He was, perhaps, of secluded, perhaps of eccentric habits. It is probable that he was considerably younger than Mrs. Allen, and probable, also, that he never saw her after her marriage, if ever in his life; nor does it appear that she was at any time after her marriage, if she was at any time in her life, in Staffordshire or Worcestershire. Now, as the controversy between the parties at present is genealogical merely, so is it reduced to a single point, since it may for every present purpose be taken that Mrs. Allen was the daughter of one John Hollins; that the intestate had a paternal uncle baptized at Kinver in 1723, whose name was John Hollins; that, if he was the John Hollins who was the father of Mrs. Allen, she was the sole next of kin of the intestate at his death, and that, unless John Hollins, the intestate's paternal uncle, was the same person as John

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Hollins, the father of Elizabeth Allen, the case of the plaintiffs and their suit altogether fail.

At the hearing of the cause, though the defendant had no evidence, the Court, considering the evidence, on the plaintiffs' part, of Mrs. Allen's alleged relationship insufficient, deemed it right to direct certain issues which have been tried, and of which it is at present material to consider only one,—that, namely, raising directly the single question, whether John Hollins, the paternal uncle of the intestate, was Mrs. Allen's father. Of that issue, upon the trial of which a verdict has been found against the plaintiffs, I am now to dispose of their motion for a new trial, made on the several alleged grounds of receivable evidence rejected, misdirection, the verdict being against evidence, and surprise. And first, it has been contended, that the learned Judge who tried the case rejected evidence that ought to have been received, and in doing so laid down a rule which prevented the plaintiffs' counsel, as it is said, from tendering other evidence of a similar nature, which, as it is also said, was ready to be tendered and was properly receivable. The evidence thus tendered and rejected was constituted of declarations alleged to have been made by Mrs. Allen and her deceased brother-in-law in the intestate's lifetime. The rejection of Mrs. Allen's declarations was not, as I understand, grounded upon the fact that they were declarations made by her. And a similar remark applies, I apprehend, to those of her brother-in-law. But it has been contended on the argument of this motion, that on two alleged grounds (as to one of which it is urged that it could not have been taken at the trial on account of the form of the record, and the other of which, if well founded, applies probably as well to her brother-in-law as to herself), this Court ought to treat Mrs. Allen's declarations even merely and strictly of relationship, though made in the intestate's lifetime, as being wholly inadmissible for the

plaintiffs, whatever their nature. I do not think it on the present occasion, or for the present purpose, material, and I do not decide, whether at the trial it would have been right to reject her declarations of every kind, or those of her brother-in-law of every kind, or whether her declarations of every kind ought to be by this Court treated as inadmissible for the plaintiffs, being of opinion that the case has taken a course which renders it improper for me to consider either of those points, as bearing upon the question, whether the finding of the jury, impeached on this motion, is to stand.

The objection in respect of the declarations of Mrs. Allen and her brother-in-law, to which the learned judge acceded, was against their admission, for the purpose of shewing that she or her family came from a particular place, district, or country. Certainly and obviously it was very important to the plaintiffs' case to shew, if possible, that Mrs. Allen, or her family, came from the parish of Kinver, in Staffordshire, already mentioned; for with that parish the intestate's family was connected; in it, as before stated, he and his father, and paternal uncle, John, were baptized; in that parish the intestate was, I believe, buried; and there, too, it seems probable, if it is not certain, that his father and paternal grandfather were buried. There also, in the year 1748, the plaintiffs assert, and the defendant denies, Mrs. Allen to have been baptized. Certainly, in that year, one Elizabeth Hollins was baptized there, and the person so baptized must, I think, be taken to have been the daughter of John, the intestate's paternal uncle: nor of her, as to marriage, or death, or otherwise, since her baptism, has any account been given if she was not Mrs. Allen. [His Honor here read a portion of the notes of the Lord Chief Justice, comprising the questions proposed to be put and overruled, and proceeded as follows]:—

Now, if either of the questions thus overruled ought to have been, and had been, allowed to be put, I cannot as-

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sume that it would not have produced information important or material to the plaintiffs' case. The probability in my judgment is, that if they ought to have been, and had been, allowed to be put, some, or one, or each of them, would have produced information of such a kind; and especially I must think so, when I observe the depositions in this cause prior to the decree, which I have read. It is, I conceive, reasonably possible that answers to those questions might have materially influenced the verdict, and properly influenced it, if the jury, believing the answers, were by law authorized to take into their consideration the place, or district, or country, represented by the declarations as that from whence Mrs. Allen or her family came. But the defendant's counsel contended, and successfully, that the law does not allow a fact or circumstance of that nature to be proved, even upon a question of pedigree, by hearsay evidence, even by such hearsay evidence as is certainly admissible to prove mere relationship; and the case of *Rex v. Erith* has been said to establish or prove that proposition.

The case of *Rex v. Erith* I assume to have been well decided. I think, however, that it does not go the length for which the defendant's counsel have contended, or govern the point of evidence in dispute here. That, of the evidence tendered in the present instance, no part was tendered necessarily to shew the place of any birth, may, perhaps, be thought a slight remark; but it was tendered certainly for a purpose merely genealogical, that is, for the sole purpose of elucidating the question who Mrs. Allen's father was, by shewing whence she or her family came. The birth-place, the residence, the location, of her father, or herself, or her family, were and are immaterial, except as tending to prove, and the declarations were offered only as a part of the means of proving, whether he was the brother of the intestate's father. I do not, however, deny that it is very possible to suppose many a case of a written or an oral declaration by a deceased relative as to a single act, or a particular fact, being so far

inadmissible, or so far of no account, although tendered solely with a view to prove relationship.

A general rule against allowing particular facts or single acts to be proved by hearsay, which is frequently applied in cases of public right or custom, must, I suppose, be considered as extending, though probably in a less wide or less ample manner, or with more qualification, to cases of pedigree. Lord Eldon in *Whitlocke v. Baker* (a), after saying "it was not the opinion of Lord Mansfield, or of any judge, that tradition generally is evidence, even of pedigree," &c., says, "but there may be many circumstances forming part of the tradition which you would reject, taking the body of the tradition." A birth, however, from a single woman, a birth from a married woman, a death, a marriage, is a particular fact or a single act, which, of course, is provable by hearsay (hearsay from a proper quarter) on a question of pedigree. And, as I apprehend it to be settled that the time absolutely or relatively of a particular birth may be, so I am not aware that the time absolutely or relatively of a marriage or death may not be, thus proved upon a question of that nature; but for such a purpose is there a solid ground of distinction between time and place? There may be, but I do not distinctly perceive it. If a declaration be, "I heard my wife's mother say that she had a son born at Dublin on Christmas-day;" or, "I heard my grandfather say, that he had an elder brother who died at sea before my mother's birth;" or, "I heard my grandfather say that he had married while in Scotland a Scotchwoman, who was his second wife's cousin"—is it to be received as genealogical evidence, except as to the words "at Dublin," "at sea," "in Scotland," "a Scotchwoman," and are those words to be substantially rejected or entirely disregarded if they tend, or although they tend, to elucidate an obscure point in the pedigree? In each of these supposed cases the place

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(a) 13 Ves. 514.

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might prove the time; which might be material, and not otherwise provable.

The questions, however, which in the present instance it was not permitted to the plaintiffs' counsel to put, may be thought not of necessity liable to the same objection, if any, as a direct question whether a deceased person has been heard to say where another person was born.

In the instance before the Court, the questions disallowed were (I repeat) these:—"Have you heard her (meaning Mrs. Allen) say where her family came from?" "Have you heard her (meaning Mrs. Allen) say where she came from?" and (after a witness had stated his father to have said that that father's brother, who was Mrs. Allen's husband, had married Miss Hollins), "did he say of where?"

Are these questions within the reason or principle upon which proof, by hearsay, of single acts or particular facts, is excluded, so far as it is excluded, in a case of pedigree? According to my understanding of that reason or principle, so far as I have been able to collect it, I am disposed to say rather that neither of the three questions is within it, than that they are all within it. They seem to me to relate rather generally to the history of a life, or of a family, than particularly to a single transaction, or the doing of a single thing, and, perhaps, rather to the description or identification, or (if I may use the phrase) individuation of a family or person under discussion, than to a history of a family or of a life.

But if not impeachable for the reason or upon the principle to which I have just referred, the question still may be without the principle or beyond the reasons upon which hearsay evidence is admitted at all on points of pedigree. Are they so? I confess myself not persuaded that they are. I own myself not convinced that the reasons and grounds (so far as I can collect and understand them) upon which births and times of births, marriages, deaths, legitimacy, illegitimacy, consanguinity generally, and particular degrees

of consanguinity and of affinity, are allowed to be proved by hearsay (from proper quarters) in a controversy merely genealogical, are not as applicable to interrogatories like those that have been rejected in a case like the present, as to an interrogatory whether a man's grandfather was said to be related to some other man, or in what year, on what day, or at what time, or of what parents a man was said to have been born; whether a man's mother was said to be illegitimate; whether she was said to have been married, or to have brought a child into the world before or after a marriage, or what her name was said to have been; or (to resort for an instance to one of the questions allowed to be put and answered on the trial in this case) whether it had been said "what her father was." Who generally is more likely to know whence a man or a family came than the man or the family? Does the emigrant, living or dying, forget his native soil? Is a woman less likely to state her country than her age with accuracy? In those persons, also, who care for the history of lineage, whom genealogy interests, local attachment, local predilections, and local memory, are, for the most part, lively and strong; nor are there, perhaps, any recollections or traditions of the old more readily communicated, or more acceptable to an auditory of descendants, than the original seat of the family, its former residences and possessions, its migrations, its local and other distinctions of the past, its advancement or its decay. If such topics are not strictly genealogical, they are at least intimately connected with genealogy. Their exclusion, surely, from those traditions to which the law, for the very purpose of preserving the memory and proof of common ancestry and connected lineage between families, allows the force of evidence, must, as it seems to me, at least tend strongly to deprive of the law's protection cases in great number and variety needing most peculiarly its aid, and in the most striking manner within its reason. Nor do I refer merely to such instances as those

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of branches from English families planted in distant colonies; for, in the same country, the severance and estrangement that arise between wealth and poverty, industry and idleness, prosperity and misfortune, illustration and obscurity, vanity and humility, are often more effectual and complete than could be the distance between Northumberland and Australia.

It can scarcely, I suppose, be contended, that whenever, in a statement by a deceased person of a relationship between that person and another individual, or a particular family, the residence or country of the individual or family is mentioned, the statement must, for so much, be rejected or disregarded. There might then be no identification. The statement might then be without meaning or unintelligible, or without applicability. Let us suppose a declaration (from a proper quarter) to be given in evidence in these words:—"My father was not the person that you imagine. He was John Smith of the Hill—not John Smith of the Dale;" or thus, "As my father's mother came from Suffolk, she could not be the person to whom you refer;" or thus, "My sister married a man of the same name, it is true, but he was born and bred in a parish in Berkshire, as he has often told me, and he died there." What is the objectionable part, or the part that is to go for nothing, of either of these statements? In the present instance, the sole dispute in effect was, of what John Hollins was Mrs. Allen the daughter; it being proved or conceded that she was the daughter of some John Hollins, and that the intestate had a paternal uncle called John Hollins. The theory of the defendant, if Mrs. Allen was the daughter of some John Hollins, must be, that there were at least two men each called John Hollins. And whether the plaintiffs' case is true or untrue, there may have been two or more persons of that name. Supposing that there were two or more men of that name, would a declaration by Mrs. Allen, specifying her father, and distinguishing him from the other

or each of the others so called, by stating his country or residence, or that of his family, be so far rejected? And if the answer to a question allowed to be put at the trial which I have already noticed, had been, "She told me that her father was rather more than a farmer, that he was a country gentleman," would it have been treated as nothing? Or had the answer been, "She told me that her father was a Staffordshire yeoman," would the word "Staffordshire" have been rejected or substantially disregarded? If Mrs. Allen had had a Bible containing entries of births and marriages in her family, which would have been evidence, and it had been tendered at the trial and found to contain a description of her father as "John Hollins, of Kinver," would it have been right to tell the jury to pay no attention to the two last words? As a man or a family may be identified, may be distinguished and discriminated from other men or other families by a name, why not by an occupation? and why not by a residence?

To say nothing of the time when surnames were not general in England, there are now-a-days in this country many men, especially those having servants, that are in habits of daily intercourse with persons whose surnames, if any, they do not know, and, as I have heard, men who, if they have surnames, are not themselves aware of them. Nor are some illustrious painters the only persons whom many know by nicknames and by nicknames only. Of surnames, some are exceedingly common, not in Wales merely, but in England too. In particular districts of England, particular surnames frequently abound. In many parts of Wales, not only is the number of surnames very limited, but, within the last half century, the surname of a family was liable to change, and often did change at every generation; nor is the custom, I believe, wholly extinct. Often, in cases such as those to which I have been referring, hearsay of relationship, without local addition or local designation, may, I repeat, and as is obvious, be absolutely worthless.

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But whatever I may correctly or erroneously think as to reason or principle, I ought certainly not, upon my own notions, to act against any authority long followed, against a series of authorities, or a course of decisions, or perhaps even against a single decision of a certain class and kind. The books, however (and I have not looked into them carelessly on this subject), do not appear to me to shew, nor am I persuaded, that there is any authority long followed, or a series of authorities, that there has been a course of decisions or any decision of a nature to bind the Court—of which it must be in contravention to say, that either of the disallowed questions under consideration might properly have been allowed to be put and answered; the matter in issue having been such as it was.

I repeat that the case of *Rex v. Erith* (a) appears to me substantially distinguishable from the present. Lord *Ellenborough* there says—"The only doubt which has been introduced into this case has arisen from improperly considering it as a question of *pedigree*, &c." That case involved no question of relationship; this involves singly and merely a question of relationship.

If the place of birth in *Rex v. Erith* had been a genealogical fact, as it was not,—had been material, namely, for any genealogical purpose, which it was not, Lord *Ellenborough* and the Court of King's Bench might possibly have dealt with the evidence differently. Here the disallowed interrogatories applied not necessarily (as I observed before, and as is obvious) to a place of birth; they applied merely to the country or district or place from whence the declarant or her family had come, or of which Mrs. Allen, before her marriage, had been; nor am I satisfied (I say again) that interrogatories such as those ought to be considered as in all

(a) 8 East, 541, see p. 542.

respects on the same footing with a mere interrogatory what had been said to be the place of a birth. And here I may refer to a case mentioned in Mr. *Hubback's* learned and useful publication at p. 468, as to matter not noticed in Mr. *Simons's* report of the same cause—I mean *Hood v. Lady Beauchamp* (a), in which I was, as I believe, one of the counsel. That is an authority bearing, as it seems to me, against the rejection of the evidence rejected here; and I may say the same of the case before Mr. Baron *Rolfe* at Liverpool (b).

I had, while at the bar, always thought, too, that when wills and sepulchral inscriptions were received upon questions of pedigree, they were not in practice rejected or slighted, so far as they attributed (when they did attribute) particular countries of origin, or particular residences, to persons mentioned in them, but were legitimately capable of being in that respect important evidence. It is not my impression that the residences stated in the inscription which was the subject of contention in *Slaney v. Wade* (c) were thought matters unfit to receive judicial attention. And, in *Davies v. Lowndes*, one of the cases mentioned by Mr. Serjt. *Talfourd*, (a cause tried at bar), there appears reason to think that the judges and counsel concurred in treating one or both of the residences mentioned in the alleged will of James Lloyd as a material portion of the evidence, if the instrument was his will. To render it, however, proper for me to decide, against the opinion of the learned judge who tried this issue, that the questions which he overruled ought to have been allowed to be put and answered, I ought, at least, to have in my own mind a clear opinion amounting to absolute conviction, that, according to law, they ought to have been allowed to be put and answered. Now, though I cannot represent myself as satisfied that they ought not to have been so, it would be

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(a) 8 Sim. 28.

(b) *Rishton v. Nesbitt*, 2 Mood. & Rob. 554.

(c) 1 M. & Cr. 338.

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too much to say, that I have a clear opinion upon the point amounting to absolute conviction. If (as I do not say) I ever had such a conviction, my high estimation of Sir *Thomas Wilde's* great knowledge and great experience would have caused me to hesitate.

On the whole I do not find myself able either to grant or refuse a new trial upon this particular point without assistance from a court of law, according to the course pursued or intended in the case of *Kidney v. Cockburn*.

I proceed to state why it is that I do not now resort to that assistance.

Samuel Shields, the son of the plaintiffs, was a material witness for them at the trial. The learned judge described him to the jury as one of the most important in the case; and Mr. *Attorney-General*, the leading counsel for the defendant, in his able speech to the jury, had previously described the testimony of this person as that which Mr. Serjt. *Talfourd*, in addressing them for the plaintiffs, had with truth said, was, if the jury would believe it, decisive of the case. But the learned *Attorney-General* spoke of Samuel Shields to the jury, as the man, who, if they should find a verdict for his mother, was entitled to one half of the large real estate of the intestate, and as, therefore, substantially the plaintiff; though, during the argument of this motion, it was, I collect, the impression upon both sides, and perhaps it was in effect proved at the trial, that, supposing the plaintiffs' case true, the title to the share of the intestate's real estate, which, on that hypothesis, would have belonged to Mrs. Allen, is in the children of her deceased son. The learned *Attorney-General*, I say, strongly impressed upon the jury that this witness was not credible, that the story told by him of a conversation with Richard Hollins, and of the witness's journey through Birmingham to Wolverley was a fiction; that not a word of his evidence was to be believed. Now, the great or only materiality of this witness's testimony consisted in a conversation that he re-

presented himself to have had with the intestate on the occasion of a visit which he said that he had made to the intestate, and which visit the witness said was the object of the alleged journey just mentioned. And certainly it was within the line of the learned counsel's duty to question this young man's credibility, especially as, independently of his near relationship to the plaintiffs, independently of the nature of his narrative, independently of the absence of confirmatory evidence, he was contended, and, perhaps, not without foundation contended, to have been, as to a part of his testimony, contradicted by the witness Lloyd, whom, however, the learned *Attorney-General* also designated as at least a most suspicious witness, as in effect a witness not to be trusted. [His Honor then read some passages upon the same subject from the learned judge's charge.]

Now I must, I think, as the case is altogether circumstanced, conclude that the jury disbelieved both the witnesses Shields and Lloyd. Of the latter, the evidence was probably not material, except on the hypothesis of Shields being perjured. Why Lloyd was or should have been disbelieved, I am not aware. That, however, is a question with which probably I have little or nothing to do; but if he had been believed, perhaps the verdict on the second issue might have been the other way. I do not say that in that case it ought to have been the other way, nor do I venture to say whether he ought to have been believed.

With regard to the witness Shields, it may, I think, be taken not merely as very reasonably possible, but as highly probable, that, had the jury believed him, the verdict on the second issue would have been for the plaintiffs. It appears that, in addition to other circumstances capable of being plausibly and not unfairly urged, and which were ably urged against the credibility of his narrative, it was unconfirmed; nor is it probably too much to say wholly and absolutely unconfirmed. The want of evidence corroborative of it was noticed pointedly by the Lord Chief

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Justice in the terms that I have read. But let us suppose that there had been some evidence confirmatory of it. Rank and villanous perjury is not lightly to be assumed. This young man, so far as appears, went into Court with an unblemished reputation; nor can his narrative, I think, be reasonably pronounced to be in itself, or on the face of it, incredible. If so, is it not possible, fairly possible, that confirmatory testimony of the narrative even as to the journey to Birmingham alone might rationally have had weight with the jury, may well deserve consideration? I think that it is.

Now, since the trial, three persons whom I must regard as unimpeached, have made these affidavits. [His Honor here read the affidavits.]

I confess that these affidavits, though I agree that the Coxfords do not identify Samuel Shields as the person whom they saw at Birmingham, have made some impression upon me; especially as there is not any affidavit on the part of the defendant. I thought it, however, prudent, so far as the case turns on the affidavits, to ask a learned judge of the greatest experience in the courts of common law, whether, in his opinion, if an analogous question were to arise in one of those Courts upon a motion or rule for a new trial in an action, a new trial would be granted on the affidavits. His answer has been in the affirmative. Now, though neither that answer (by which I feel myself so much obliged) nor the general course or habit of dealing with such matters at common law binds me, they are nevertheless entitled to much attention and consideration.

There is, however, yet another circumstance bearing with more or less force on the question, whether there shall be a new trial, which is not perhaps unworthy of remark.

The plaintiffs were not examinable at law. The defendant's answer, however, was read in evidence there; read by the plaintiffs I am aware, but that appears to have happened thus. I have hitherto spoken of three issues only;

nor did I ever mean that there should be more. [His Honor here read a portion of the decree, and of the record at law.]

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Now, when I made the decree, when I directed these issues, I was perfectly satisfied of the fact of the intestate having had a paternal uncle, named John Hollins, and did not mean that it should be denied or disputed at law; nor am I convinced that, by the language of the decree, or by the form of the record at law, my intention is insufficiently expressed or was frustrated. The words are not "daughter of a paternal uncle." The definite article is used with a name. The phraseology seems to me, I say it with deference, as much to assume that Richard Hollins had a paternal uncle named John Hollins, as that Richard Hollins himself had lived at Wolverley, and ceased to exist. If the words were sufficient to express my meaning, were adapted to the purpose that I had, it should not have been required of the plaintiffs to give evidence that the intestate had a paternal uncle named John Hollins; that is, the fact should not for a moment have been disputed. But I collect that, at the trial, the defendant's counsel not admitting it, the learned judge ruled that the plaintiffs were bound to prove it, that is, to prove as a distinct matter in issue, the fact that the intestate had a paternal uncle named John Hollins, and I collect also (independently of the statement made at the bar by Mr. Serjeant *Talfourd* upon the argument of this motion) that the defendant's answer proving that fact plainly, it was for the purpose merely of proving it that the answer was put in. After it had been put in, the defendant's counsel admitted, as it would have been then frivolous to dispute, the fact. [His Honor here read passages with reference to this subject from the short-hand writer's notes and the learned judge's report.]

Now, it is possible, though I am certainly not persuaded, that the decree or record at law, or both, might have been worded so as more clearly to express and demonstrate my

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meaning. But however that may be, the second issue has certainly not been tried according to what, in truth, was my intention—which intention I believe to have been at the hearing well known and perfectly understood by the counsel then in the cause, neither of whom appears to have been among the counsel at the trial—an omission that Lord *Eldon*, upon motions for new trials of issues, noticed more than once with regret as creating, or having a tendency to create, inconvenience. Whether my meaning was well or ill expressed, that meaning, I repeat, was, that it should not be a question at the trial whether the intestate had a paternal uncle named John Hollins.

Upon the whole matter, not by this circumstance alone, but by this circumstance with the affidavits, with all the evidence that was before the jury, with the depositions taken in the cause previously to the decree, and with the recollection of the total absence of evidence on the part of the defendant here and at law, I am induced to think it the reasonable and the just course to direct a new trial of the second issue, without asking the assistance of a court of law on the subject of the disallowed questions. But the plaintiffs must agree to admit at the trial to be had, that they sue in right of Mrs. Shields, as the administratrix of Mrs. Allen, and not in any other right or character; that Mrs. Allen died intestate, leaving Mrs. Shields her next, or one of her next, of kin; that the defendant is the administrator of the intestate Richard Hollins, and that the sole object of the suit is to establish that he left Mrs. Allen his sole next of kin at his death, and to establish by that title a right to have the clear residue of his personal estate applied as personal property of Mrs. Allen.

I may add, that, small as probably is the amount of the intestate's personal estate, and impossible as it seems now to be that the title to his real estate can be bound or affected by any thing done or to be done in this suit, I have been unable to bring myself to allow these considerations to in-

duce a course on my part not otherwise in my judgment proper.

Mr. *Russell* urged, that, if a new trial were directed as to the second issue, the first ought to be tried again also. But the first is not now, if it ever was, material. For the third issue having been found, and as I think correctly and satisfactorily found, for the plaintiffs, it is established that Mrs. Allen survived the intestate. Mrs. Shields, therefore, as a party to this suit, is either interested as Mrs. Allen's administratrix merely, or is not interested at all. If Mrs. Allen could have been shewn to have died before the intestate, the question, whether she was Mrs. Shields's mother, would have stood in a different position.

Reserve the costs of the motion.

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BELLRINGER v. BLAGRAVE.

Jan 11th.

JOHAN BLAGRAVE, of Calcot, in the county of Berks, by his will, dated 5th of November, 1787, gave and devised to John Blagrove and Sir John Simeon, their heirs, executors, and administrators, all his freehold and leasehold messuages and hereditaments in the parishes of St. Lawrence, St. Mary, and St. Giles, in Reading, as well as such parts thereof as were his own separate estate, the chief of which were let on leases for long terms of years determinable on lives, and renewable on the death of every life on payment of fines certain, and the remainder thereof let at rack-rents, &c. The testator then proceeded as follows:—"And I hereby give full power and authority to the said John Blagrove and John Simeon, and their heirs, to accept and take surrenders of all the present and future leases of such messuages, lands, tenements, and hereditaments, as relate to my separate

Bill for the execution of a covenant contained in a renewed lease granted by trustees dismissed; the covenant being *ultra vires* of the trustees.

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estates in Reading, which are now or shall hereafter be let on leases for years determinable on the decease of lives to be named in any such new lease, but not for more lives at one and the same time, at and under the like annual reserved rent or rents, heriots, fines, fees for renewal, covenants, conditions, and agreements, as shall be contained in the several leases thereof at the respective times of their being surrendered; and in case any such leasehold estates shall fall in by the decease of all the lives by which the same shall be held, or by the expiration of the terms of years for which they were leased, then, either for such valuable consideration in money as my trustees can agree for, to grant new or fresh leases of all such parts thereof for long terms of years, determinable on the decease of three lives to be named in every such new lease, but not for more lives at one and the same time, at and under such rent or rents, and such fine or fines for renewal in future, as my said trustees can agree for, to be incident and go along with the reversion and inheritance of the estates thereby to be respectively letten, and at and under the like covenants and agreements as are usually contained in the leases of my estates in Reading aforesaid let on lease."

In a subsequent part of his will, the testator, in alluding to the parts of his estate let upon leases, for lives, added, "which are always to be leased in manner before directed."

The testator died shortly after the date of his will.

By an indenture dated the 1st of October, 1802, and made between John Blagrove and Sir J. Simeon, the trustees, of the first part, Lucy Deane of the second part, and Thomas Cowslade of the third part, a messuage and premises, which were alleged by the bill to have been let upon a lease for lives, at the respective dates of the will and the testator's death, were, in consideration of a surrender made to the trustees of a lease, dated the 25th of April, 1800,

and of £380 paid to the trustees by Cowslade, demised by them to Cowslade, his executors, &c., for ninety-nine years, if three persons therein named, or either of them, should so long live. The indenture contained a covenant by Thomas Cowslade, if either of the three lives should die within the term, to pay, within twelve months, to the trustees, £8, as a fine for renewal, and to tender to the trustees for their execution a lease for ninety-nine years, if the two survivors and one other person, to be nominated by him, or any or either of them, should so long live, and the trustees were to execute the renewed lease upon the tender and payment, &c., being made to them.

The plaintiffs, Henry Bellringer and Alice his wife, having become entitled to the lease of 1802, they, upon the death of one of the lives in 1834, proposed the life of George Gardener, aged seventeen, in substitution for the life of the deceased nominee. And they instituted the present suit against the trustees, for the purpose of compelling the execution of a new lease of the premises for the life of George Gardener, or for ninety-nine years, determinable on his decease.

The question was, whether the trustees had authority, under the will of the testator, to enter into the covenant contained in the deed of the 1st of October, 1802.

Mr. *Russell* and Mr. *Randell*, for the plaintiffs, contended, that the defendants, the trustees, could not be heard to say that the lease of 1802 was invalid. The plaintiffs did not ask for a perpetual renewal of the lease, but only execution of the covenant contained in the lease of 1802. It must be assumed that the lease of 1802 contained the same covenants as the previous lease of 1800, which was recited in it, and which was lost. That lease had been granted by the testator's father, who was tenant for life of the property, and acquiesced in by his son. The tenant for life

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was equally interested with the present defendants in getting rid of the renewable leases. [The *Vice-Chancellor*.—The lease of 1802 was in effect for four lives, over the selection of one of which the lessor was to have no controul.]

Mr. *Wigram*, Mr. *Bacon*, Mr. *Craig*, and Mr. *Berrey*, appeared for the defendants.

THE VICE-CHANCELLOR.—It is not necessary to refer to *Mortlock v. Buller* (a) and *Ord v. Noel* (b) for the purpose of being satisfied that this Court does not generally interfere to enable or assist parties to commit a breach of trust; and in the present case, if the covenant for the renewal in question is a breach of trust, this Court cannot, I apprehend, interfere for the purpose of its performance. Now, I think, that it plainly was a breach of trust, unless, by means of some covenant or engagement into which the testator had entered in his lifetime, the trustees were bound to give the covenant for renewal in question, or some such covenant. It is also plain, in my judgment, upon the materials which have been brought before me, that it is neither admitted nor proved that the testator had entered into any covenant or engagement by which the lessors of 1802 were bound to give the covenant in question. I am apprehensive, therefore, that if the only information to be obtained upon the subject is the information now before the Court, the bill must be dismissed. But it may be a question, whether, if the plaintiffs conceive that they have a reasonable prospect of proving that the testator entered into a covenant or engagement, by means of which the lessors of 1802 were bound to give this covenant, they should have an opportunity of trying what they can do.

(a) 10 Ves. 202.

(b) 5 Madd. 438.

The plaintiffs' counsel then asked an enquiry.

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Enquire under what (if any) lease or leases, and subject to what (if any) covenant or covenants, the hereditaments in question were held at the time of the testator's death ; and whether, under or by means of any, and what covenant or engagement, by which the testator or his estate was bound in his lifetime, it was the duty of John Blagrove and Sir John Simeon, or incumbent upon them, to enter into the covenant for renewal contained in the lease of 1802, or a covenant of such a nature or kind.

The plaintiffs' counsel afterwards elected to have their bill dismissed.

SANFORD v. SANFORD.

Jan. 19th,
Feb. 8th.

LUCY JEKYLL, widow, by her will, dated the 31st of December, 1831, bequeathed to certain persons whom she named as trustees, the sum of £3000 sterling, upon trust to invest the same, and to pay unto her niece, Caroline Sanford, the interest during her life for her separate use, and, after her decease, upon trust to pay, assign, and transfer the said sum of £3000, or the stocks, funds, and securities whereon the same might be invested, unto the child or children of her said niece living at her, the testatrix's, decease, or thereafter to be born, absolutely; and in case there should be no such child or children, then upon trust, after the decease of her said niece, if she should survive the testatrix, or otherwise after her, the testatrix's, own decease, to pay, assign, and transfer the said sum of £3000 stocks, funds, and securities, unto Henry Sanford and Wilhelmina

Testatrix, by will, bequeathed £3000 in trust for C. for life, for her separate use, and, after her death, for her children; and in case there should be no such children, in trust for P. By a codicil, stating that C. had been largely provided for from other sources, the testatrix deducted the sum of £2900 from the legacy of £3000, and revoked so much of the legacy accord-

ingly, leaving C. £100 only as a remembrance of her affection :—*Held*, that the legacy of £3000 was revoked *in toto*, and that in lieu of it the legacy of £100 was given for the absolute benefit of C.; and that P. took no interest either in the £100 or any part of the £3000.

Effect of conflicting dispositions, in a will, and in a codicil, of the same residuary personal estate.

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Putt, and his and her several and respective executors, administrators, and assigns, in equal shares, as tenants in common; but, in the event of both or either of them the said Henry Sanford and Wilhelmina Putt dying before the testatrix, then upon trust to pay, assign, and transfer the whole of the said £3000 stocks, funds, and securities unto the longest liver of them the said Henry Sanford and Wilhelmina Putt, whether he or she should die in the testatrix's lifetime or not, and to his or her executors, administrators, and assigns, for his, her, or their own absolute use and benefit. And the testatrix bequeathed the sum of £4000 sterling unto and amongst all and every the daughter or daughters of her late niece Francis Tilson, who should be living at the time of the testatrix's decease, or who should have previously died, leaving any child or children living at the testatrix's decease, in equal shares, as tenants in common, the child or children of a deceased daughter or daughters to take the share intended for his, her, or their deceased parent or parents, to and for her and their own use and benefit, severally and respectively. [There was a similar bequest of £4000 sterling in favour of the testatrix's nieces, Lucy Sanford, Juliana Sanford, Elizabeth Sanford, and Mary Sanford.] The residue of her personal estate not otherwise disposed of by her will, or which she might not otherwise dispose of by any codicil or codicils, and subject to the payment of her debts, and to such legacies or annuities as she might give by her will, or by any codicil or codicils thereto, the testatrix bequeathed as follows:—One equal third-part or share unto her said niece Caroline Sanford, for her own absolute use and benefit; but, if she should die before the testatrix, then she bequeathed the same unto and equally between the said Henry Sanford and Wilhelmina Putt, if they should both survive the testatrix, their respective executors, administrators, and assigns, as tenants in common; but, if only one of them should survive her, then the whole to such survivor, or his or her executors, administrators, or

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assigns: as to one other equal third-part or share of her said residuary estate and effects, the testatrix bequeathed the same unto, between, and amongst her said nieces Lucy Sanford, Juliana Sanford, Elizabeth Sanford, and Mary Sanford, or such of them as should be living at the time of her decease, equally to be divided between them, share and share alike, as tenants in common, and their several and respective executors, administrators, and assigns, to and for her and their own absolute use and benefit, in addition to the aforesaid legacy of £4000 in a former part of the will bequeathed to them; and, if there should be only one such daughter, then to such only daughter; and if each or any of her said last-named four nieces should marry and die in her lifetime, leaving any child or children living at the testatrix's decease, then she directed that such child or children should take the share so intended for his, her, or their parent or parents. And as to the remaining third-part or share of the said residue, the testatrix bequeathed the same unto, between, and amongst all and every the said daughters of her said late niece Francis Tilson living at the time of the testatrix's decease, and their child or children respectively, and in addition to the aforesaid legacy of £4000, in like manner as she had bequeathed the said last-mentioned equal third-part or share unto, between, and amongst her said four last-named nieces, and the child or children of them respectively, as last aforesaid.

After the date of the will, and before the date of the codicil after mentioned, Henry Sanford and Wilhelmina Putt died; the latter being the survivor.

The four daughters of Frances Tilson referred to in the will, were, Mary Juliana (Mrs. Morgan), Emily, Margaret Augusta (Mrs. Moseley), and Charlotte Sophia (Mrs. Austin).

Before the date of the codicil, Emily Tilson died, unmarried; Mrs. Moseley died, leaving two children; and Elizabeth Sanford died, unmarried.

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In a codicil, dated the 3rd of December, 1842, the testatrix expressed herself as follows:—"And whereas my dear niece Caroline Sanford has been so largely provided for, and has received so great an addition to her income, under and by virtue of the will of her late brother, Henry Sanford, I hereby deduct the sum of £2900 (which she will never want) from the said legacy or sum of £3000 bequeathed to her by my said will; and I do hereby revoke so much of the said legacy accordingly, leaving her the sum of £100 only, as a remembrance of my affection and regard for her, which has suffered no abatement or diminution. And whereas I have, by my said will, bearing date the 31st day of December, 1831, given and bequeathed the sum of £4000, in equal shares and proportions, to the four daughters of my late niece, Frances Tilson, and Emily Tilson, one of the four daughters, having died before me; now, I do hereby give and bequeath the sum of £1000, being the share of the £4000, which would have been paid to the said Emily Tilson had she survived me, together with that portion of the residue of my personal effects, to which the said Emily Tilson would have been entitled under my said will, unto Mary Juliana Morgan, the eldest daughter of my said late niece Frances Tilson, and to her children, in addition to the share which I have bequeathed to her and her children by my said will. And whereas Margaret Moseley, another of the children of my said niece Frances Tilson, having died in my lifetime, I hereby give and bequeath the legacy given to her by my said will, or any codicil thereto, together with that portion of the residue of my said personal estate and effects which she the said Margaret Moseley would have been entitled to under my said will, to her children, to be divided between them, in equal shares and proportions. And all the residue and remainder of my estate and effects, of whatsoever nature or kind the same may be, after the payment of my just debts, legacies, funeral expenses, and the costs of proving this my will, I desire may be

divided into four equal parts or shares; and I give and bequeath one part or share to each of my said nieces, Juliana, Lucy, and Mary Sanford; and the remaining fourth part or share I desire may be divided between Mary Juliana Morgan and Charlotte Austen; and, in all other respects not hereby altered or revoked, I confirm my said will."

The testatrix died on the 26th of July, 1844.

Caroline Sanford was living and unmarried at the hearing of the cause.

The principal questions were, whether the revocation of the legacy of £3000 was total, or only extended to the life-interest of Caroline Sanford; and in what manner upon the true construction of the will and codicil, taken together, the residue was divisible.

It was admitted at the bar, that the testatrix had no real estate.

Mr. *Russell* and Mr. *Elmsley*, for the plaintiffs.

Mr. *Calvert*, for the defendant Caroline Sanford.

Sir *F. Simpkinston*, Mr. *Swanston*, Mr. *Wigram*, Mr. *Lloyd*, Mr. *Goodeve*, Mr. *Sundys*, Mr. *Hitchcock*, Mr. *Lewis*, and Mr. *Ivory*, for the other defendants.

The following cases were referred to: *Earl of Hardwicke v. Douglas* (a), *Doe d. Winter v. Perratt* (b), *Duffield v. Duffield* (c), *Cockrill v. Pitchforth* (d), *Twining v. Powell* (e).

The VICE-CHANCELLOR.—The points arising in this case on the testatrix's codicil of 1842, are not without difficulty. I have considered them as well as I can, and formed an opinion upon them. I think that she must be taken to have

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(a) 7 Cl. & F. 795.

(b) 9 Cl. & F. 606.

(c) 3 Bligh, N. S. 261.

(d) 1 Coll. 626.

(e) 2 Coll. 262.

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meant, absolutely, a total revocation of the legacy of £3000, in which a life-interest had, by the will, been given to Miss Caroline Sanford, and in lieu of it to have substituted a legacy of £100, for that lady's absolute benefit. My impression therefore is, that the personal representative of Mrs. Putt has not any contingent or other interest in the £100, or in any part of the £3000.

The questions concerning the residue have seemed to me the most embarrassing, and especially those depending, or argued to depend, on the meaning and effect of the word "only," used with reference to Miss Caroline Sanford's £100—on the effect of the proposition, if true, that assuming the testatrix to have had real estate at her death, that real estate would not have been affected by her testamentary dispositions, had she not made the codicil of 1842, and had she instead of it merely republished her will in that year—and on the effect, or absence of effect, upon the original share of the residue intended by the will for Mrs. Morgan, of the passage beginning with the words "in addition to the share."

I have, but not without hesitation, arrived at the conclusion, that it will be an interpretation of the codicil, not less likely than any other to be in conformity with the views and intention of the testatrix, to say, that the clause at the end of it beginning, "And all the residue and remainder of my estate," and terminating with the words, "Charlotte Austin, and in all other respects not hereby altered or revoked, I confirm my said will," does not affect or relate to the shares of the residue, to which, in the absence of that clause, Mrs. Morgan, Mrs. Moseley, and Emily or Amelia Tilson, respectively, would, under the will, have been entitled, if they had all survived the testatrix; or either of those three shares: that one of those three shares belongs, by virtue of the will or codicil, or both, to Mrs. Moseley's children; that by virtue of the will and codicil the other two belong to Mrs. Morgan; and that the residue in all other respects (that is, the whole residue except those three shares) belongs

as to three-fourths to Juliana, Lucy, and Mary Sanford, and as to the remaining fourth, to Mrs. Morgan and Mrs. Austin. And as this also is the construction of the codicil, which is, in my judgment, more in conformity than any other with general principles and general rules of testamentary interpretation, I think it right to adopt it, and to direct distribution of the residue accordingly.

I ought not, I think, to treat the final residuary clause in the codicil, as unmeaning or inoperative, or as meant only to extend to such real estate, if any, as the testatrix had or might have, and the share of the residue originally intended for Miss Caroline Sanford, or to one of those two subjects. While, on the other hand, the intention to give to Mrs. Morgan, and to give or preserve to the children of Mrs. Moseley, respectively, the shares of residue originally intended for Emily Tilson and Mrs. Moseley appears, I think, so strongly and plainly upon the codicil, that it is, as I conceive, the duty of the Court, if reasonably and fairly possible, to reconcile that expression of intention with the final residuary gift. In my opinion, as I have said, it is reasonably and fairly possible; and though an intention of a similar kind in Mrs. Morgan's favour, as to her original share of the residue, is perhaps not expressed with equal clearness or distinctness, I do not feel myself warranted in not extending the benefit of such a construction to her, though I have not omitted to notice the use of the word "portion" as distinguished from the word "share," upon which an argument was very fairly urged at the bar.

But I repeat that I am not confident (and especially as to Mrs. Morgan's original share of the residue) that the views which I take of this singular instrument—singular I mean when read with the will to which it refers—are correct.

I should have delayed my judgment longer had I not become convinced of the impossibility of doing better with the case, as far as I am concerned; though I am satisfied that there may be dissent from my interpretation without litigi-

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ousness or unreasonableness. I ought perhaps to add, that I understood the testatrix to have been admitted at the bar not to have had, when or after she made the codicil of 1842, any real estate, and (though this is probably superfluous) that, by Mrs. Moseley's and Mrs. Morgan's original shares of the residue, I have meant those which would have been their shares of the residue under the will singly, had Emily Tilson and Mrs. Moseley both survived the testatrix.

It may be convenient to state the mode in which, under the will alone, the residue would have been, and the mode in which, if I am right in my interpretation of the codicil, the residue must be, apportioned; at least as it seems to me.

Let it be considered as divisible into 288 shares. These under the will alone would, I conceive, have been apportionable thus—Miss Caroline Sanford would have taken ninety-six, Miss Lucy, Miss Juliana, and Miss Mary Sanford, would, between them, have taken ninety-six, Mrs. Morgan thirty-two, Mrs. Austin thirty-two, and the children of Mrs. Moseley thirty-two.

But the codicil, as I understand the case, thus varies the matter—Miss Caroline Sanford is excluded, and the 288 shares are apportionable as follows:—To Miss Lucy, Miss Juliana, and Miss Mary Sanford, one hundred and sixty-two between them (instead of ninety-six); to Mrs. Morgan seventy-five (instead of thirty-two); to Mrs. Austin twenty-seven (instead of thirty-two); and to the children of Mrs. Moseley twenty-four (instead of thirty-two).

I am, however, so bad an arithmetician, that I do not rely on these calculations. If they depart from the principle that I have stated, they must go for nothing.

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EDWARDS v. CHAMPION.

IN May, 1797, an estate, called Acridges, which had been holden for lives, of the lords of the manor of Bleadon with Priddie, in the county of Somerset, was, on the nomination of George Yeo the then proprietor, granted in reversion to Ann Bailey (then Ann Yeo) for the term of her life, immediately after the death, surrender, or forfeiture of the said George Yeo, George Yeo his son, and Mary Yeo his daughter.

The grant to Ann Bailey was made to her as a trustee only for George Yeo.

George Yeo the son, and Mary Yeo the daughter, having died, a fresh grant of the premises in reversion was made in May, 1807, on the nomination of George Yeo: the nominee in reversion in trust, being his daughter Sarah Yeo, and the previous nominees for lives being the said George Yeo, the said Ann Bailey, and Maria Thomas. At the same time George Yeo surrendered into the hands of the lords of the manor all his interest in the premises, to the intent that the lords might thereafter regrant the same, to such person or persons, and for such life or lives, as the surrenderor should by will give, devise, direct, limit, or appoint.

George Yeo, by his will, dated the 11th January, 1815, gave as follows:—"I give, devise, and bequeath all that both estates, late Deanes and Acridges, in Bleadon aforesaid, unto my beloved wife, Mary Yeo, as long as she shall remain a widow; and if my wife should happen to marry, then I give, devise, and bequeath the aforesaid premises unto my daughters, Jane Yeo and Sarah Yeo, and their heirs, and for want of such issue, then to Nancy Bailey (meaning the before-named Ann Bailey) and her heirs, for ever, and my wife to keep the same full stated; and in case my wife should happen to marry, and lost the estates to my daughters, then they shall pay her £20 a year, at half-yearly payments

*Jan. 28th &**29th.**Feb. 1st & 2nd.*

Two women, being joint-tenants of copyhold lands, one of them and her husband surrendered their estate and interest to the intent that the lord should regrant the same to such person or persons as the husband should by will appoint. The wife died in the lifetime of her husband and sister. The husband afterwards died, having, by his will, appointed the surrendered share to his executors:—*Held*, that there was a severance of the joint-tenancy.

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during her life." The testator then, after making certain other devises and giving various pecuniary legacies, proceeded thus:—"All the rest, residue, and remainder of my household goods, estates, chattels, monies, and securities for monies, I give, devise, and bequeath unto Sarah Yeo and Jane Yeo, their heirs, executors, administrators, and assigns;" and he appointed them executrixes of his will.

The testator died in 1818, without revoking his will, which was proved by the executrixes. He left his widow, Mary Yeo, and also Ann Bailey, and his daughters Sarah Yeo and Jane Yeo, surviving him.

After the testator's death, and in 1818, Mary Yeo, the widow, was admitted tenant in dower or free-bench of Acridges, for her widowhood, according to the custom of the manor. She entered into possession of the property, and not marrying again, received the rents down to the time of her death, which took place in 1844.

Sarah Yeo married George Edwards; and, in 1820, Acridges was granted to George Edwards and Jane Yeo, at their nomination, in trust for their own sole use and benefit, for the term of their natural lives, and the life of the longest liver of them successively, at the will of the lords, immediately after the death, surrender, or forfeiture of Ann Bailey and Sarah Edwards; and thereupon Ann Bailey was admitted tenant in trust for George Edwards and Jane Yeo.

Jane Yeo afterwards married William Champion; and in 1831, she and her husband surrendered their estate and interest in Acridges, to the intent that the lords of the manor might, at any time thereafter, regrant the same to such person or persons, for the same or such further or other life or lives, as William Champion in and by his last will and testament in writing, already made and duly executed, or which he might at any time thereafter make and duly execute, should give, devise, direct, limit, or appoint the same.

Jane Champion died, leaving Sarah Edwards, her sister, surviving her.

In 1844, after the death of the widow, an action of ejectment was brought for one moiety of Acridges, on the joint demise of William Champion and Ann Bailey.

The bill, filed by George Edwards and Sarah, his wife, against William Champion and Ann Bailey, after suggesting a breach of trust on the part of Ann Bailey, in allowing her name to be used in the action of ejectment, prayed that it might be declared, that the devise to Sarah Edwards and Jane Champion, of Acridges, was a devise to them as joint tenants; and that, by the death of Jane Champion, the entire equitable estate in remainder, after the death of Mary Yeo, the widow, vested in the plaintiffs in right of Sarah Edwards; that Ann Bailey might be decreed to assign the property to the plaintiffs, and for an injunction, &c.

Champion by his answer, submitted that, by the surrender of 1831, the joint tenancy created by the will of the testator was severed, and consequently, that upon the death of the widow, the entirety of Acridges did not vest in the plaintiffs, but that one moiety devolved to the defendant, by reason of his marriage with Jane Yeo.

Upon the death of Champion, a bill of revivor and supplement was filed by his executors, to whom he had devised all his copyhold estates upon certain trusts.

Mr. *Lee* and Mr. *W. M. James*, for the plaintiffs, contended, that the surrender of 1831, though followed by the will of William Champion, effected no severance of the joint-tenancy. It might be conceded that a surrender by a joint-tenant to the use of his will, his death, and will found, would operate as a severance: Co. Litt. 59. b.; *Gale v. Gale* (a). But, here, at the death of the surrenderor, the wife, there was no will on which the surrender could operate. The wife having

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(a) 2 Cox, 136.

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made no disposition of the property under the surrender, the husband could do no act to complete the severance. The husband having survived his wife, there was an interval during which there were no uses, and the husband was a wrong doer. The surrender alone not followed by admittance or any other act, was insufficient for the purpose of severance: *Roe d. Jeffereys v. Hicks* (a); *Rex v. Mildmay* (b). —They also referred to Litt., sects. 286, 287; *Carr v. Singer* (c); *Prankerd v. Prankerd* (d).

Mr. *Hodgson*, Mr. *Prendergast*, and Mr. *Malins*, for the defendants.—Considering this as a joint-tenancy, we submit that there was a severance from the time of the surrender, and not merely from the death of the donee of the power.

According to Lord *Coke*, the surrender by a joint-tenant to such uses as he may by will appoint, or according to the terms of his will, such surrender being followed by a will made in pursuance of the surrender, and by his death, is a severance of the joint-tenancy; for, by relation, the state of the land is bound by the surrender: Co. Litt. 59. b. But it is said that here there was no severance, because the surrender was not to the use of the surrenderor's own will, but to that of her husband's will, and that there was an interval between the death of the surrenderor and the operation of the husband's will. It is submitted, however, that the effect of the surrender was to make the moiety included in it the property of the husband. He could have been admitted to that moiety. The case is analogous to that of a fine levied by husband and wife, and a deed declaring the uses of the fine in favour of the husband. In the interval the uses result: *Harris v. Evans* (e). Suppose the case of a surrender, to the intent that the lord may regrant

(a) 2 Wils. 13.

(b) 5 B. & Adol. 254.

(c) 2 Vez. sen. 603.

(d) 1 S. & S. 1.

(e) Bridgm. 547.

to such uses as A. B. shall appoint by will. If A. B. makes his will and dies, and the surrender is presented and enrolled, that, according to the authority of *Gale v. Gale* and of Lord *Coke*, is a severance; yet, at the death of A. B., no act beyond the surrender has been done by the surrenderor. The surrender is made effectual for the purpose of severance, by the subsequent will, by way of relation. There is no doubt that a bargain and sale is a severance of the joint-tenancy, though not enrolled till after the death of the bargainer. So, where one of two joint-tenants in fee executes a conveyance by lease and release, and limits the property to such uses as he shall by will appoint; if he makes a will, it will take effect as an execution of the power, but until the will there is a resulting use in severalty, and he becomes tenant in common with his companion. These principles apply to a surrender of copyholds. Such a surrender is analogous to a conveyance under the Statute of Uses, and uses to arise *in futuro* may be limited in it: *Boddington v. Abernethy* (a).

On these grounds, admitting the plaintiffs to have been right in filing the original bill, the bill of revivor and supplement cannot be maintained; and their case fails from the beginning, if the Court should be of opinion that there was a tenancy in common. *Cook v. Cook* (b); *Barker v. Giles* (c); *Wilkinson v. Spearman* (d).

Lastly, considering the copyholds as holden for lives, and not as copyholds of inheritance, the surrender was a perfect conveyance of the estate to the lord, and effected a severance; and from the time of the severance the lord held the estate subject to the trusts of the surrender; *Vin. Abr. Copyhold*, X. e. pl. 3. In that view the estate would be a chattel interest, and descendible to the ancestors, or to the heirs

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(a) 5 B. & C. 781.

(b) 2 Vern. 245.

(c) 2 P. W. 280.

(d) MS. Lin. Inn. Library,

from which it appears that the statement in *Cray v. Willis*, 2 P. W. 529, that the lands were the subject of devise, is an error.

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(if not barred by the act of the ancestor) as special occupants.

Mr. *Lee*, in reply.—The estate sought to be recovered is an estate in the nature of freehold, and an equitable interest. It is not a chattel interest. It is true that, in the former part of the will, the gift to the daughters is only in case the widow marries, and she never did marry; so that in the absence of other words, it might be necessary to apply to this case the principles of *Luxford v. Cheeke* (a), and other decisions of that class. The subsequent gift, however, of all the testator's "goods, estates, chattels," &c., to his two daughters, renders that application unnecessary. *Quâcunque viâ datâ*, the two daughters took either a joint-tenancy for life with several inheritances, or a joint-tenancy in fee.

In this state of circumstances one of the daughters made, with her husband, a surrender to such uses as he should appoint by his will. Upon her death in his lifetime, the original grant carried the estate to the surviving joint-tenant. Litt. sect. 286. Can it then be said that an event which happened after the right of the surviving tenant ripened, shall destroy that right? Is it consistent with principles of law, that a person who is in by the original grant, shall be defeated by the power so given to make a will? In the case relied upon on the other side, the surrender was by the joint-tenant to the use of his own will, followed by his death and due presentment. It was there held, upon the doctrine of relation, that the surrender would have effect. The reason for the decision, founded on the doctrine of relation, is unsatisfactory; but the authority of it cannot be disputed. Take, however, a case put by Lord *Coke* of a different complexion: "If two joint-tenants be of a term, and the one of them grant to I. S., that if he pay him £10 before Michaelmas, that then he shall have his

(a) 3 Lev. 125. See Fearn. *Mackinnon v. Sewell*, 2 M. & K. Cont. Rem. 239. See *Sheffield v.* 202.
Lord Orrery, 3 Atk. 282, 284;

term; the grantor dieth before the day, J. S. pays the sum to his executors at the day, yet he shall not have the term, but the survivor shall hold place, for it was but in the nature of a communication." *Co. Litt.* 185. a. Here the surrender was no more than a "communication." To effect a severance there must be an actual and complete alienation: *Partridge v. Poclett (a)*.

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Before judgment was delivered, the defendants consented to waive all claim to rent, between the death of the widow and the death of William Champion, and to make good all rent, if any, received by them during that time.

The VICE-CHANCELLOR.—Assuming that there was a joint-tenancy, I am clearly of opinion, upon authority equally, and principle, that here there was an effectual severance—whether so as to affect the enjoyment of the property before the death of William Champion, is, in my judgment, a serious question, upon which, but that it has been waived, I should probably have thought it right to ask the assistance of a court of law. That question, however, has been waived by the defendants; the defendants not only relinquishing all claim to the rents for that time, but consenting, if it shall appear that they have received any of those rents, to make them good; and consenting also to pay the costs of the action of ejectment. Under these circumstances, if the defendants consent to the decree which I am about to read, I am of opinion, that justice between them and the plaintiffs entitles the defendants to such a decree. The decree would be thus:—

With the consent of the defendants, and without prejudice to any question as to the construction of the will of George Yeo, or as to the legal or equitable effect of the surrender made by Champion and wife in the year 1831, Declare, that the plaintiffs, in right of Mrs. Edwards, were entitled to the hereditaments called Acridges, in the pleadings mentioned, from the time of Mary Yeo's death to the death of William Champion, and to the entirety of the rents and

(a) 2 Atk. 54.

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profits of such hereditaments during that time. And with the consent of the defendants, dismiss the bill, so far as the same claims an interest beyond the life of the deceased defendant, William Champion, in the moiety of the hereditaments called Acridges, in the pleadings mentioned, which was comprised in the surrender of 1831, in the pleadings mentioned. And with the like consent, and without prejudice as aforesaid, let the defendants be restrained from issuing execution on the judgment in ejectment, obtained as in the pleadings mentioned, and from commencing or prosecuting any proceedings at law against the plaintiffs, or either of them, for the recovery of the moiety of the hereditaments, which was not comprised in the surrender of 1831, or for recovering the rents and profits of such moiety which have accrued since the death of William Champion; or any of the rents or profits of the said hereditaments which accrued due before the decease of William Champion, and from disturbing the plaintiffs, or either of them, in the enjoyment of the said moiety not comprised in the surrender of 1831. And with the like consent, and without prejudice as aforesaid, let the defendants within a month take all necessary steps for causing and procuring the said judgment, and all proceedings in the said action of ejectment, to be set aside, with costs at law, to be paid by the defendants. But the defendants are to be at liberty to commence and prosecute any other action or actions that they may be advised for the recovery of the moiety of the said hereditaments comprised in the surrender of 1831, or the rents and profits of such moiety which have accrued since the death of William Champion. And the plaintiffs desiring not to have, and waiving any reference or inquiry as to the rents and profits of the said hereditaments which accrued before the death of the said William Champion, or any part thereof, or as to the possession, enjoyment, or management of the said hereditaments, or any part thereof, before his death, let the defendants pay to the plaintiffs their costs of these suits, except so far as such costs have been increased by the plaintiffs claiming any interest beyond the term of the life of the said William Champion in the said moiety of the said hereditaments which was comprised in the surrender of 1831, and except the costs of issuing and serving any writ of injunction under the present decree. And let the costs of these suits, so far as such costs have been increased by the plaintiffs claiming an interest as aforesaid beyond the life of the said William Champion, be paid by the plaintiff, George Edwards, to the defendants. Costs to be set off on each side. Usual directions. Liberty to apply.

The defendants consented to this decree.

An appeal was afterwards presented to the Lord Chancellor by the plaintiffs, when his Lordship was pleased to direct a case to be stated for the opinion of a court of law.

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OKILL v. WHITTAKER.

Feb. 12th &
13th.

BY an indenture of lease, dated the 10th of May, 1755, certain messuages in Liverpool were demised to John Tonge, his executors, administrators, and assigns, for the natural lives of the said John Tonge, Jane his wife, and Mary their daughter, and for the term of twenty-one years, to commence at the death of the survivor of them.

The property having become vested in the plaintiffs Charles and William Okill, as trustees under a settlement, they, on the 7th of March, 1836, offered it, together with other property, for sale by auction, in lots; and under the supposition that Mary Tonge, the survivor of the lives, had died on the 3rd of December, 1823, they caused it to be stated in the particulars of sale, that "lots 4 and 5" (the property in question) "are leasehold, and will be sold for the remainder of a term of twenty-one years, which commenced on or about the 3rd of December 1823, being the residue of the lease of the said last-mentioned premises."

The property was not disposed of at the auction, but was purchased by private contract, by Thomas Whittaker; the contract being comprised in the two following letters:—

"Messrs. Okill.

Gentlemen,—I hereby offer you the sum of 300*l.* for lots 4 and 5, described in the conditions of sale of Robert Mawdaley's property, of which you are the trustees; and I agree to purchase at that sum, for the residue of the lease, being eight years from December next.

"Yours truly,

"THOMAS WHITTAKER.

"Liverpool, 9th March, 1836. "

"Mr. Thomas Whittaker.

Sir,—Messrs. Okill accept your offer of 300*l.* for lots 4 and 5, mentioned in the conditions of sale, for the residue of

Where, by the mutual mistake of vendor and purchaser as to the duration of a leasehold interest, it had been sold at a price considerably below its value, and the conveyance had been executed, and the purchaser let into possession:—
Held, upon a bill filed some years afterwards by the vendor against the representatives of the purchaser, that the vendor was not entitled to be relieved against the mistake.

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the term of the lease, namely, eight years from December next, and they agree to sell the above lots to you at that sum; and I will thank you to give me a call in the course of to-morrow, and direct me to whom I am to send the abstract of title, which is ready.

"I am, Sir,

"Your obedient servant,

"JOHN NEAL.

"46, Castle-street, 10th March, 1836."

This contract was soon afterwards completed by means of an indenture of assignment, dated the 22nd of March, 1836, by which, after reciting the indenture of demise, and that Mary Tonge was the survivor of the lives named in the lease, and that "she died on or about the 3rd of December, 1823, when the said term of twenty-one years commenced;" and reciting the title of the plaintiffs, and that they had agreed with Whittaker, for the sale of the premises to him for 300*l.*, "for the residue now unexpired of the said lease;" it was witnessed, that in consideration of the said sum of 300*l.*, the plaintiffs assigned the premises to Whittaker, to hold the same "for all the residue now to come and unexpired of the said term of twenty-one years, granted by the said lease, and which term commenced on or about the 3rd of December, 1823."

Whittaker having paid his purchase-money, entered into possession of the premises, and remained in such possession until his death, in 1842, when they devolved to the defendants, his executors.

The bill, filed the 30th of December, 1845, after alleging that the plaintiffs had been misinformed as to the time of the death of Mary Tonge, and that they had lately discovered that she did not die until the 25th of March, 1835, on which day the term of twenty-one years commenced; and after charging that the purchase or consideration money was fixed and accepted on the assumption that the term had

only so much to run as it would have had to run if it had in fact commenced on the 3rd of December, 1823, prayed that it might be declared that Whittaker was in equity only entitled to the premises for the residue of a term of twenty-one years computed from the 3rd of December, 1823, and that the defendants might be decreed to re-assign them, and to account for the rents as from the 3rd of December, 1844.

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The defendants by their answer admitted that Mary Tonge did not die until the 25th of March, 1835, but stated their ignorance as to whether the purchase-money was fixed or accepted on the assumption stated in the bill. They believed, however, that it was the intention of Whittaker to purchase the premises whatever might be the term to come therein, and that the duration of the existing term was a matter of minor importance to him, it being his principal object to obtain a renewal, which, though not a matter of right, would in all probability be granted.

The cause now came on for hearing.

It appeared from the evidence on the part of the plaintiffs that the loss which they incurred from the mistake amounted to about £200. The plaintiffs, also, with a view to shew the extent of interest purchased by Whittaker, proved that the words, "being eight years from December next," were introduced at his own request into the proposal to purchase.

Mr. *Anderdon* and Mr. *Charles Hall*, for the plaintiffs, contended that the defendants must be held to the strict terms of the contract, which they said was for the purchase of a term of twenty-one years, from the 3rd of December, 1823. Any other construction of the contract would have the effect of giving the defendants a more valuable thing than that which the vendors had contracted to sell and the purchaser to purchase. They referred to *Calverley v. Williams* (a).

(a) 1 Ves. jun., 210.

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Under the civil law, if an urn were sold for silver which was not silver, the contract was void.

The *Vice-Chancellor* observed, that if the civil law were called in aid, the question would be, whether the thing sold differed in *substance* from that which had been contracted to be sold. His Honor then referred to the following passages in the eighteenth Digest (a):— * * *Si igitur ego me fundum emere putarem Cornelianum, tu mihi te vendere Sempsonianum putasti, quia in corpore dissensimus, emptio nulla est. Idem est, si ego me Stichum, tu Pamphilum absentem vendere putasti. Nam cum in corpore dissentiatur, apparet nullam esse emptionem. Si in nomine dissentiamus, verum de corpore constat, nulla dubitatio est, quin valeat emptio et venditio; nihil enim facit error nominis, cum de corpore constat. Inde queritur si in ipso corpore non erratur, sed in substantiâ error sit, ut, puta, si acetum pro vino veneat, aes pro auro, vel plumbum pro argento vel quid aliud argento simile, an emptio et venditio sit? Marcellus scripsit libro sexto Digestorum, emptionem esse et venditionem; quia in corpus censensum est, etsi in materiâ sit erratum. Ego [His Honor observed that *Ulpian* was here speaking] in vino quidem consentio; quia eadem prope obola (i. e. substantia) est, si modo vinum acuit. Cæterum si vinum non acuit, sed ab initio acetum fuit, ut embamma (i. e. intinctus,) aliud pro alio venisse videtur: in cæteris autem nullam esse venditionem puto, quotiens in materiâ erratur. Aliter atque (according to *Paulus*) si aurum quidem fuerit, deterius autem quam emptor existimaret: tunc enim emptio valet.*

Mr. *Russell* and Mr. *Chandless*, for the defendants.—The plaintiffs ask the active interposition of the Court to remedy their own laches. They do not ask to rescind the contract, for then they would have been met by the defence of a purchase for valuable consideration; but they ask to have

(a) Dig., lib. XVIII, tit. 1, ss. 9, 10.

it varied. There is no case in terms like the present. It is in some degree analogous to *Dowell v. Dew* (a), *Muskerry v. Chinnery* (b), and other cases, where the property has been bought subject to leases which have turned out more valuable than was expected. Here the subject-matter of the contract was the residue of the term. The proposition was to buy the residue. Anything added was simply matter of description. The residue was the *ousia* or thing contracted for. Besides, the Court will not on the mere ground of mistake set aside a conveyance. Where there has been mutual mistake, and after conveyance the mistake is found out, the Court will not relieve. It was asked on the other side whether, if vendors, possessed of a term of 1000 years, sold it by mistake as a term for one year, and the purchaser so purchased it, the transaction would be allowed to stand? The answer is, it must follow the general rule. It may be met by another case, that of an estate sold free from incumbrances, and after conveyance an incumbrancer found out: would the Court rescind the contract? The Court would tell the purchaser that he ought to have looked to the title: he had taken covenants for the title, and must stand or fall by them. The cases of *Bree v. Holbech* (c), and *Cripps v. Reade* (d), are in point. Here the purchaser has expended money on the premises on the faith of having the residue of the term whatever it might be. [In the course of the argument reference was had to *Story*, Eq. Juris. Vol. 1, sects. 139, 146, 149, 150, 151.]

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Mr. *Anderdon*, in reply.—If there be mutual mistake in the subject-matter of the contract, neither at law nor in equity is the contract supported: either party may say—*Non hæc in fœdera veni*. Why are the defendants to have twelve years in the term, which they never contracted to buy? If you could combine the eight years and twelve

(a) 1 Y. & C. C. C. 345.

(b) Lloyd & G. t. Sugd. 185.

(c) 2 Doug. 632.

(d) 6 T. R. 606.

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years, unembarrassed by the deed assigning the whole term, there would be no difficulty in severing the parts which each party is entitled to enjoy. Then does the deed make any difference? Not if it contains more than is contained in the contract: *Colyer v. Clay* (a), *Hitchcock v. Giddings* (b), *Carpmael v. Powys* (c), *Thomas v. Davis* (d). The contract, notwithstanding the deed, may be rescinded, or may be made available *pro tanto*. The cases of purchases of real estates, covered by covenants, do not apply. Suppose the sale of a fee instead of a life estate, the Court would rescind the contract, though the conveyance had been executed. Here the *ousia* of the contract is the eight years.

The VICE CHANCELLOR.—In this cause all considerations belonging peculiarly to cases of fraud, or of specific performance, are out of the dispute, because unfairness on either side is neither proved nor suggested, and the purchase was completed by payment of the money, the assignment of the property, and the delivery of possession, a considerable time before the institution of the suit. Those also who object to the contract are the plaintiffs. The question is, what was that thing which the vendors intended to sell, and the purchaser intended to buy? Was it a term of eight or nine years, or was it a specific lease, erroneously supposed not to have more than eight or nine years to run? That is the material question. Now the property had been exposed to sale by auction, or intended to be so. [His Honor here stated the circumstances of the auction, and of the subsequent contract with, and conveyance to, Whittaker, and proceeded thus:—] From all this, the just and inevitable conclusion I think is, that the thing which the vendors intended to sell, and the purchaser intended to buy, was not a term of eight or nine years, but was the lease of 1755, as it affected this pro-

(a) 7 Beav. 188.

(b) 4 Price, 135; 1 Dan. 1.

(c) *Cor. M. R.*, M. T., 1846.

(d) 1 Dick. 301.

perty, erroneously supposed to have a shorter time to run than in fact it had to run. That being so, it must be impossible, I think, to give the plaintiffs relief in this case upon any other footing than that of rescinding the contract wholly—from the outset rescinding the contract; and upon what ground is that sought in a case where, I repeat, there is a total absence of unfair dealing, and where the peculiar doctrines of specific performance are entirely beside the question? The purchase was, as I have stated, complete in the month of March, 1836. The purchaser lived until 1842, when he died, and therefore those who have to administer justice between the parties are deprived of all the assistance and information which he, if living, might have given; and it is not until two or three years after his death, and some eight or nine years after the purchase, that this bill is filed, which must be treated as a bill for the purpose of rescinding the contract, that being the only reasonable ground upon which it may be suggested that such a bill could be sustained; and it proceeds upon alleged mistake. How the vendors could make such a mistake, it is difficult to understand. For the present purpose it is not too much to say, that it was their duty to know what was the state, what was the condition, of the property which they had to sell. By what means, or under what circumstances, this mistake was made, or how it happened that they were in this strange state of ignorance, or error, or both, is totally unexplained. But there is a still greater lack of information; it is not shewn when, by what means, or by what persons the supposed mistake was discovered, or when the truth was revealed to the minds of the vendors or the mind of the purchaser—all that is left in obscurity and doubt. And the Court is now asked to rescind the contract. I am of opinion that such a bill must be dismissed, with costs.

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Affirmed upon a rehearing before the Lord Chancellor. See 2 Phill. 338.

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Feb. 20th.March 5th.

A man cannot be charged in equity, after his majority, on a purchase or sale, or contract, made during his minority, on the mere ground, that, without any false assertion by the infant, the other party believed he was not a minor, and dealt with him on the supposition that only adults could enter into such transactions. The Court, therefore, refused to entertain a bill for an injunction to restrain an action brought to recover certain railway shares which had been sold and assigned, by deed, to the plaintiff in equity by the plaintiff at law, during the infancy of the plaintiff at law, there being no evidence against the plaintiff at law of misrepresentation as to his infancy.

STIKEMAN v. DAWSON.

EARLY in June, 1842, Messrs. Middleton & Barber, share and stock-brokers at Liverpool, directed their London agents, Messrs. Ewart & Bell, to sell for them forty-five quarter shares of the Manchester and Leeds Railway Company. Accordingly, on the 7th June, Messrs. Ewart & Bell sold the shares to the plaintiffs, Messrs. Stikeman & Barry, as the brokers of the Reverend J. Hoole, for 247*l.* 10*s.*, and the plaintiffs, upon payment of the purchase-money, received from Messrs. Ewart & Bell, the certificates of the shares, together with a transfer of them to Mr. Hoole, by John Kiddell Dawson, in whose name the shares were registered in the books of the railway company.

The transfer was by deed, bearing date the 14th June, 1842, under the hand and seal of John Kiddell Dawson, and witnessed by John Middleton, of the firm of Middleton & Barber.

Ewart & Bell, by letter of the 15th June, apprized Middleton & Bell of the completion of the sale. Sometime afterwards, the plaintiffs sent the shares and transfer to Mr. Witheringham, their agent at Manchester, who delivered them to the secretary of the company for the purpose of their being registered.

On the 12th September the secretary of the company, by letter of that date, informed Mr. Hoole that he had received a notice from Mr. John Dawson, the father of John Kiddell Dawson, which was as follows:—

Liverpool, 3 Harrington Street,
20th June, 1842.

To the Company of Proprietors of the Manchester and Leeds Railway Company, and to the Directors, Treasurer, Secretary, and other officers of the said Company.

I hereby give you notice, and require you, not to

register or allow the completion of any transfer of shares in the above Company, which may have been executed or made by my son, John Kiddell Dawson, who is a minor, under the age of twenty-one years.

Your obedient Servant.

JOHN DAWSON.

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In consequence of the difficulty in completing the purchase, the plaintiffs (as alleged by the bill) repaid to Mr. Hoole the amount of his purchase money, and he discharged them from all responsibility, and assigned to them all his right and interest in the shares.

In September, 1842, John Kiddell Dawson attained his majority; and in November, 1845, he brought an action against the plaintiffs to recover back the certificates.

The bill, filed against the Dawsons and Middleton & Barber, prayed that it might be referred to the Master to inquire whether John Kiddell Dawson was an infant when he executed the transfer, dated the 14th June, 1842; and if he should be found to have been then an infant, then that the execution of such transfer to Mr. Hoole might be declared to have been a fraud practised upon him, and upon the plaintiffs, as his brokers, and that John Kiddell Dawson, by his long acquiescence, might be declared to have acknowledged the validity of, and to have confirmed the transfer, and to be bound thereby; and that he and all other persons claiming under and through him might be decreed to execute to the plaintiffs, as purchasers from Hoole, a valid transfer of the forty-five shares, &c., or, if the Court should be of opinion that the plaintiff was not entitled to such assignment and transfer, then that it might be declared that Middleton & Barber had been guilty of a fraud upon the plaintiffs, and might be decreed to place them, as purchasers from Mr. Hoole, in the same position with respect to the said shares, as they would have been in if the transfer to Mr. Hoole had been valid and binding on John

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Kiddell Dawson; the plaintiffs offering to repay all monies paid for calls since the 14th June, 1842; and for an injunction against the action, and against any sale or dealing with the shares, &c.

The bill charged that the defendant, John Kiddell Dawson, pretends and alleges that he was an infant under the age of twenty-one years at the time when he executed the transfer of the forty-five quarter shares to John Hoole for the valuable consideration before mentioned; and that the transfer is utterly null and void on account of such infancy, and ought not to be enforced against him: whereas the plaintiffs charge the contrary, and that the defendant John Kiddell Dawson was of full age at the time when he executed the transfer. That, for a considerable time prior to the date of the execution of the transfer, the defendant John Kiddell Dawson had had considerable dealings, and had been engaged in large speculations in railway shares, especially in the South Eastern and Dover Railway. That, in all such dealings and speculations, he held himself out to the world as being of full age, and that, from his personal appearance and general conduct in matters of business, he was generally considered by mercantile persons, at Liverpool and elsewhere, to be of full age, and to be capable of dealing and speculating in railway shares, and of attending to business on his own account. That, the defendants Messrs. Middleton & Barber, as brokers and partners, had, for some time previous to the 14th of June, 1842, acted as the agents to the said defendant John Kiddell Dawson; and that, in all business transactions conducted by them on account of the said defendant John Kiddell Dawson, they considered him to be, and held him out to the world as being, of full age, and capable of contracting for the purchase or sale of shares of different descriptions.

The bill further charged that some time in the month of January, 1844, the plaintiff, Henry Frederick Stikeman,

had an interview with the defendant, John Kiddell Dawson, at which the last-named defendant stated, that the original purchase money for the said forty-five quarter-shares was the money of his father, the defendant, John Dawson, of Liverpool, wine merchant; that the defendant, John Dawson, had caused the said shares to be registered in the name of his son, the defendant, John Kiddell Dawson, in order to divest him of any liability which might attach to the purchaser or holder of such shares; and that the defendant, John Kiddell Dawson, for some time previous to the execution of the said transfer, had taken a leading part in the management of the business of the defendant, John Dawson, and had entered into contracts on his behalf, and had in all respects been treated by his said father, as far as regards all matters of business, as if he was of full age. Then followed charges that the defendant, John Dawson, had since paid out of his own proper monies, in the name of his son, John Kiddell Dawson, all the calls which had been made in respect of certain new sixteenth-shares, which had since been created by the Manchester and Leeds Railway Company, eleven of which the company had allotted to the defendant, John Kiddell Dawson, in consequence of the said forty-five quarter-shares being still registered in his name; that the defendant, John Dawson, claims to have some interest in, or lien upon, or right of ownership, in the said forty-five quarter-shares and the eleven sixteenth-shares; and that the defendant, John Dawson, has been and is now combining with the said defendant, John Kiddell Dawson, and is seeking to deprive the plaintiffs of the forty-five quarter-shares, and all the advantages of value which has accrued thereon by means of dividends paid thereon, and new shares allotted in respect thereof.

The defendants, the Dawsons, by their answer, stated that previous to and in the month of July, 1841, the defendant, John Dawson, carried on business as a wine mer-

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chant, and had ever since continued to carry on such business at Liverpool; and that in the month of July, 1841, John Kiddell Dawson, being under the age of twenty-one years, acted as cash-keeper in such business. And the defendant, John Kiddell Dawson, stated that in or about the said month of July, 1841, he the defendant became acquainted with one Henry Surridge, then a dealer in bullion and a discounteer of country bank notes in Liverpool; that Surridge made frequent applications to the defendant, John Kiddell Dawson, to advance and lend him divers small sums of money, varying in amount from £5 to £30, for which he offered and agreed to pay a high rate of interest; that Surridge at first offered security for such loans, though he afterwards borrowed money of the defendant without giving security. That the defendant, John Kiddell Dawson, was, under the circumstances aforesaid, induced to advance various sums to Surridge out of the office cash belonging to the defendant, John Dawson, which was in the custody or control of the defendant, John Kiddell Dawson, as such cash-keeper as aforesaid. That some of such advances were duly repaid by the said Henry Surridge, and the amount thereof duly accounted for and returned by the defendant, John Kiddell Dawson, to the office cash of the defendant, John Dawson; but that Surridge afterwards became irregular in his repayments, and the defendant, John Kiddell Dawson, was unable to obtain repayment thereof, though he frequently pressed Surridge to repay the same. That in the month of March, 1842, Surridge was indebted to the defendant, John Kiddell Dawson, in the sum of £200, or thereabouts, in respect of such loans as aforesaid; and the defendant, John Kiddell Dawson, was deficient in his cash account with his father, John Dawson, in the like amount. That, after the commencement of his acquaintance with Surridge, the defendant, John Kiddell Dawson, was very frequently at Surridge's office, in Liverpool, and was in the habit of meeting

there one Richard Cobb, then a clerk in the office of Messrs. Middleton & Barber. That Cobb frequently conversed with the defendant and Dawson about jobbing and speculations in shares, and the opportunity afforded thereby for making a profit and realizing money. That the defendant, John Kiddell Dawson, soon afterwards gave an order to Cobb to purchase for him certain shares, and that he had thereafter several transactions with Cobb in the purchase and sale of shares. That on a certain occasion, in or about the month of March, 1842, Surridge being indebted to the defendant, John Kiddell Dawson, and unable to repay him, and the defendant being deficient in his cash account as aforesaid, he the defendant, John Kiddell Dawson, met and was introduced, at Surridge's office, to the defendant, John Middleton, then a partner in the said firm of Middleton & Barber. That the defendant Middleton, then and on several subsequent occasions, conversed with the defendant, John Kiddell Dawson, relative to speculations in shares; and that the constant tenor of such conversations was as to buying and selling shares, and the opportunities afforded thereby for making money. That at the time of his so becoming acquainted with Middleton, the defendant, John Kiddell Dawson, was very anxious on the subject of the deficiency in his cash account, and was very desirous of replacing the amount withdrawn by him from the office cash of defendant, John Dawson, as aforesaid, and of obtaining money for that purpose; and that by such representations as aforesaid on the part of Middleton, the defendant was induced to enter into large dealings and speculations in the purchase and sale of shares with the said Messrs. Middleton & Barber, and also into certain dealings and speculations of a similar description with other sharebrokers. That the defendant, John Kiddell Dawson, was induced to withdraw the money required for such dealings and transactions out of the office cash of the defendant John Dawson, which was in the control and custody

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of defendant, John Kiddell Dawson as aforesaid, in the hope of being able to replace the same, as well as the amount in which he was previously indebted to the defendant, John Dawson, on such account as aforesaid, out of the profits of such transactions. The defendants further stated, that during his dealings with Middleton & Barber, up to the time he went to America, on the 14th of June, 1842, the defendant, John Kiddell Dawson, was under twenty-one, and that he attained twenty-one on the 14th of September, 1842. That the defendant, John Dawson, was ignorant, up to a time after the 14th of June, 1842, of the loans made by his son to Surridge, and of the deficiency in his cash account, and of his (the son) having speculations in railway shares; that the dealings with Middleton & Barber took place partly at the office of Surridge, but latterly at the office of Middleton & Barber, in Exchange Street East, in Liverpool, distant about thirty yards from the office of Surridge; that the dealings were principally with Middleton, but during the latter part of them, with Thomas Barber, the other partner in the firm; that, to the best of the belief of John Kiddell Dawson, Middleton & Barber, during the dealings, were fully aware that he was a minor, and that Surridge informed Middleton thereof before April, 1842, and cautioned him in respect of his dealings with him, John Kiddell Dawson, on that account. [Then followed statements of particular circumstances tending to shew that Middleton & Barber had notice in May, 1842, of the defendant John Kiddell Dawson's infancy.] That, at the latter end of May, 1842, after he, the defendant John Kiddell Dawson, had had such dealings with Middleton & Barber, or through them, as his agents, they said he was indebted to them in £300; and they pressed him for payment or security, but they gave him no account: on the 1st of June, 1842, they rendered an account. That, at the time of such alleged balance being due to Middleton & Barber, he was possessed of forty-five quarter shares in the stock of the Manchester and Leeds Rail-

way Company, the shares now in question, which shares he, John Kiddell Dawson, had purchased through their broker, George Gibson. That, on being pressed by Middleton & Barber for payment, he agreed to transfer to them, as a security, those shares, as well as shares in other companies; and they prepared a certain deed purporting to be a transfer of the shares, which he executed, and left the same in their possession. That, when he executed the same, to the best of his belief, the name of the purchaser was left blank; and the date of the deed and consideration-money were also left blank. That, to the best of his belief, the deed was executed by him on the 1st of June, 1842, and not on the 14th of June, 1842, the day it appeared to bear date, and which was the day he left England for America. That, on or about the time he executed the deed, he delivered the certificates of the same shares to Middleton & Barber. That the balance so alleged to be due was represented by Middleton & Barber to be due on account of divers time bargains and other transactions in shares in the South Eastern and Dover Railway; and the defendant, John Kiddell Dawson, admitted that prior to the said transfer he had extensive dealings with Middleton & Barber in shares in that and other railways. He, however, denied that in any of such dealings and transactions he had held himself out to the world as being of full age, or that, from his personal appearance and general conduct in matters of business, he was generally considered by mercantile persons, at Liverpool or elsewhere, to be of full age; and, in fact, it was generally notorious, that defendant was then under twenty-one, and the personal appearance of defendant was such, that he really looked younger than he was. He admitted, under the circumstances before mentioned, that the defendants, Messrs. Middleton & Barber, as such brokers and partners as before mentioned, had, for some time previous to the 14th day of June, 1842, acted as the share-brokers and agents to defendant; but he denied, that,

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in all or in any of the business transactions conducted by them on his account, they considered him to be of full age, and capable of contracting for the purchase or sale of shares of different descriptions. He stated, that, on the contrary, the said Messrs. Middleton & Barber were throughout well aware that he, defendant, was an infant under twenty-one years of age, and were expressly informed thereof on the occasions and under the circumstances before mentioned. And he denied that he was of full age at the time when the various transactions in the said bill, and in his answer mentioned, took place between the defendant and the said defendants, Messrs. Middleton & Barber.

The answer of the defendants, Middleton and Barber, contained these statements. They admitted that, as brokers and partners, they had, for some time previous to the 14th of June, 1842, acted as the sharebrokers or agents of the said defendant John Kiddell Dawson in many, though not in all, the transactions in which he had been engaged; and that, in all of the business transactions conducted by them on his account, they considered him to be of full age and capable of contracting for the purchase or sale of shares of different descriptions; but they stated, that, inasmuch as they had no doubt that the defendant, John Kiddell Dawson, was, at such times, of full age, he having, at the date of the said transfer, the appearance of a man of twenty-two or twenty-three years of age, they never thought of speaking of his age to any person in the course of such transactions; and, save as aforesaid, they denied that they did hold him out to the world as being of full age, or capable of contracting for the said purchase or sale of shares of different descriptions. They further stated their belief, that the defendant John Kiddell Dawson was of age at the time when the various transactions in the bill mentioned took place between the defendant John Kiddell Dawson and themselves, and that they were not aware of, and that they did not conceal the fact of the infancy of the said de-

fendant John Kiddell Dawson at the time when they entered into different contracts on his behalf, or any of them, if the said defendant John Kiddell Dawson was, in fact, an infant at the time of entering into such contracts, or any of them. They further denied being guilty of fraud in concealing the fact of the infancy of John Kiddell Dawson from John Hoole, or the plaintiffs, as his brokers or agents; the defendants never having concealed such infancy, and not having been aware of such infancy, if it then existed, and not, in fact, now believing that such infancy did then exist.

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The cause now came on for hearing. In support of the plaintiffs' case, the several passages of the answers referred to in the judgment were read. On behalf of the defendants the Dawsons, Ann Kiddell, an elderly person, stated that she did not see John Kiddell Dawson during the year 1842, but that previous thereto his general appearance, manner, and conduct were those of a younger person. Mr. Rodick, a magistrate, also stated that he was acquainted with John Kiddell Dawson, and frequently saw him during the year 1842, though he had never any dealings or transactions with him during that year. John Kiddell Dawson visited at the deponent's house, and associated with the deponent's sons and daughters. Deponent was never acquainted with his real age. The eldest of deponent's sons was twenty-three in the month of August last, and the other twenty-two in July last; and the deponent considered John Kiddell Dawson their junior, from his general appearance and manner. His general appearance, when the deponent saw him in 1842, was boyish, and his manner and conduct childish and frivolous. Deponent did not know whether, up to any time in 1842, John Kiddell Dawson was reputed or considered to be under the age of twenty-one; but deponent himself considered him to be in the year 1842 about sixteen years of age, judging from his

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general appearance and manners, and from his being a mere boy when deponent first knew him.

Mr. *Wigram* and Mr. *Malins*, for the plaintiffs, said, that if an infant comes into the world and deals as if he were of age, he cannot afterwards set up his infancy in derogation of the contract. Such conduct amounted to a fraud, which might be relieved against in this Court: *Evroy v. Nicholas* (a), *Savage v. Foster* (b), *Watts v. Cresswell* (c), *Lord Teynham v. Webb* (d), *Beckett v. Cordley* (e), *Clarke v. Cobley* (f), *Cory v. Gerteen* (g), *Overton v. Banister* (h). Here, the infant made this deed in blank, giving it to his brokers, Middleton & Barber, to put it into whatsoever hands they pleased. Middleton & Barber were his confidential agents. Hoole accepted the deed in the ordinary course of transactions of this nature. The plaintiffs, as his agents, went into the market and dealt, not with Middleton & Barber, but with Ewart & Bell. The plaintiffs knew nothing of Dawson nor of Middleton & Barber: on the other hand, Ewart & Bell knew nothing of Hoole. It is not the practice of the share-market to inquire who the principals are for whom the brokers deal. Can the infant, availing himself of this practice, and dealing in the share-market as an adult, be allowed to contravene his own deed and recover these shares from the innocent holders of them? As to Middleton & Barber, they are proper parties to this suit, either as confidential agents of the infant or as parties acting without a principal.

Mr. *Bacon* and Mr. *Eddis*, for the defendants, the Dawsons, contended that the deed executed by the younger

(a) 2 Eq. Ca. Abr. 488; and see extract from Reg. Lib. at the end of the case.

(b) 13 Vin. Abr. 536; 9 Mod. 38.

(c) 9 Vin. Abr. 415.

(d) 2 Vez. sen. 198.

(e) 1 Bro. C. C. 353; 9 Mod. 96.

(f) 2 Cox, 173.

(g) 2 Mad. 40.

(h) 3 Hare, 503.

Dawson was voidable at his election on his coming of age, and that this Court would not restrain him in the pursuit of his legal rights; although, according to *Ex parte Watson* (a), it might refuse to assist him in the enforcement of them. As to the elder Dawson, there was no case against him.

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Mr. *Russell* and Mr. *F. Bayley*, for the defendants, Middleton & Barber.

Mr. *Wigram*, in reply.

The VICE-CHANCELLOR.—In this case, if either of the defendants had objected, at the hearing, to the frame of the suit as defective in point of parties, it is very possible that I should have acceded to the objection, upon the ground of the absence of Mr. Hoole from the record. But that course was not taken. And I did not consider it incumbent on the Court to decline to hear the cause in its present state. March 5th.

It may be convenient to consider it, in the first place, as it is a suit between the plaintiffs and Messrs. Middleton & Barber. In this respect, what decree it would have been right to make had the bill alleged either of them to have been, at or before the time of the sale to Mr. Hoole, or when his purchase-money was paid, conusant of the infancy of John Kiddell Dawson, it is not necessary for me to intimate an opinion, for the bill does not so allege. Its language is this. [His Honor here read the allegations of the bill set out, *ante*, page 92, and likewise the statements in the answer of Middleton & Barber, see *ante*, page 98].

Considering the language of this answer, and of the bill, (there is not, as I understand, any evidence for or against these two defendants, but their answer), I must I think dismiss the bill as against Mr. Middleton and Mr. Barber.

(a) 16 Ves. 235.

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The plaintiffs' counsel, indeed, conceded, in effect, that this ought to be done. I do so, however, without prejudice to an action or any other suit, and without intimating an opinion how far, or whether, they are liable at law, or may be rendered liable in equity, to the plaintiffs or Mr. Hoole, except that I may, perhaps, not improperly say thus much, that if it shall hereafter be proved against Messrs. Middleton & Barber, that those gentlemen, before they instructed Messrs. Ewart & Bell to sell the shares in question, or before the shares were sold to Mr. Hoole, were aware or had been informed of Mr. John Kiddell Dawson's infancy, their title to retain the purchase-money, if not otherwise doubtful, may probably be considered not by any means clear. I should not have thought it right to give them any costs had not the bill contained a suggestion against their pecuniary circumstances—that being so, I give them £10 costs, but not more..

The main question is, whether the plaintiffs are entitled to equitable relief against both, or either, of the other defendants. And, upon this, it may not be quite superfluous to be satisfied first, whether the father's conduct has, in any respect, been fraudulent or unfair. [His Honor here read the charges in the bill set out, *ante*, pages 92, 93.]

I have considered these charges, but I have also considered the father's answer, and the evidence, and I am of opinion that it is not established, and that I ought not to suspect, that his conduct has been, in any respect, fraudulent or unfair.

By saying this, however, I do not mean to intimate an opinion whether the shares were purchased by the son with the father's money, or property, or whether the father is entitled to follow any money or property of his into the shares. That point, or those points, I leave now untouched, assuming, for the present, that the shares were not so purchased, that he is not so entitled. It must next be recollected that it is proved as between the plaintiffs and the

Dawsons, and now conceded by the plaintiffs, that the son did not attain his majority until some time in September, 1842; until some time, namely, after Mr. Hoole's purchase money had been received by Messrs. Middleton & Barber, and he had received the instrument of transfer with the blanks supplied. It has consequently not been contended at the bar for the plaintiffs, that, on the ground of contract, or otherwise than on the ground of fraud, the title of the younger Dawson to the shares in question can be affected in this suit; for though something was said of confirmation or acquiescence, not any point of that kind was pressed, or was, upon the materials before the Court, capable of being successfully made. Nor on the part of the Dawsons has it been contended, that the frame of the bill excludes the plaintiffs from relief against the son, on the ground of fraud, supposing fraud to be by his answer or otherwise, proved against him; and without deciding, I assume, the frame of the bill not to do so, and assume therefore, that if the bill does not allege substantially that in and before June, 1842, he was aware of his true age, and aware of the civil disability or privilege of a minor, with regard to contracts of the kind in question, it was unnecessary that the bill should do so. The plaintiffs' counsel have, I repeat, in argument put, and I think properly put, their case for relief against John Kiddell Dawson, on the ground of fraud, and of fraud only.

Did he then during his minority commit in respect of the matter in question a fraud, of such a nature as to render him now amenable to this jurisdiction, for the purpose of relief on the ground of fraud? For that is the single point between him and the plaintiffs. Now the fraud imputed to him is not that of making a false assertion, or an express misrepresentation: he made none. The fraud imputed to him is that, merely, of not disclosing the fact of his minority to Messrs. Middleton & Barber; I say, to them, because he had not any dealing or communication with the plaintiffs or

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Mr. Hoole, except so far, if at all, as the dealings or communications of Messrs. Ewart & Bell and Messrs. Middleton & Barber can be considered as in a sense his dealings or communications; nor had he any dealing or communication with Messrs. Ewart & Bell, except so far, if at all, as the dealings or communications of Messrs. Middleton & Barber can be considered as in a sense his dealings or communications. If John Kiddell Dawson committed any fraud otherwise than upon his father, it must be taken to have been a fraud upon Messrs. Middleton & Barber; for the state of the record precludes me from considering them as the accomplices of John Kiddell Dawson in a fraud upon the plaintiff Mr. Hoole. Nor do I wish to be understood as suggesting that they were. Still the fraud, if any, upon Messrs. Middleton & Barber, may have been of such a nature, and attended by such consequences, as to give the plaintiffs a title to complain of it effectually against him. Now, though the imputed fraud is that merely of not disclosing a fact, yet it has been said by the plaintiffs' counsel that a fraudulent suppression, or a fraudulent concealment may be, and sometimes is, equivalent, civilly, to a false assertion fraudulently made in express terms. This I am very far from denying—I accede to the proposition. But they say moreover in effect, that in the case before the Court, as the dealings between John Kiddell Dawson and Messrs. Middleton & Barber were dealings which, from their nature, could not bind an infant without fraud on his part, it was a duty incumbent on him to apprise them of his minority; that he did not do so; that, from the nature of the dealings, his omission to do so was equivalent to a positive and express denial by him of the fact of minority; and that this was a fraud on his part for which, notwithstanding his minority at the time, he became or was answerable in equity after his majority. These in truth are the propositions to be tried between him and the plaintiffs, whom I assume, without deciding, to be proper parties

to raise against him the points involved in them: for the purpose of considering and coming to a conclusion upon which, I have read attentively the pleadings and evidence, and examined various authorities, including all those cited at the bar, and, as to the case of *Esron v. Nicholas* (called *Evroy v. Nicholas* in *Equity Cases Abridged*,) the Registrar's Book.

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Now, first, the position, that the dealings between John Kiddell Dawson and Messrs. Middleton & Barber were not of such a nature as to be capable of binding an infant without fraud on his part, is, I suppose, indisputably true. But secondly, was it his duty (as the word is understood in a court of Justice) not to enter upon those dealings without mentioning to them his true age?

Without affirming that it was, I will for the present assume so; which seems to involve an assumption, not only of the probable or certain fact that his minority and likewise its material bearing on the question of his responsibility were known to him, but moreover, of the fact of the brokers' ignorance of his minority. Such then being for the present considered to have been his duty, did he commit a breach of it? Is such a breach proved against him?

The plaintiffs must be understood as contending that it is proved against him, on the ground that (as they must be taken to insist) the burthen of proof as to this matter lay on him, and that (as they say) the proof is absent. But did the burthen of proof as to this matter lie on him? Generally it is true the burthen lies on the party who affirms, not on the party who denies; but the rule is not unqualified, is not without exception.

Neither criminality nor fraud is to be presumed; and though the case of *Williams v. East India Company* (a), and various others that preceded and have followed it, may not go all the way absolutely of establishing the point of

(a) 3 East, 192.

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the burthen of proof here against the plaintiffs, they may be thought to be not without bearing upon it. The charge against John Kiddell Dawson is, of the fraudulent omission to make a communication. I am not aware of any affirmative evidence against him in support of that charge. Assuming it to be not incumbent on the plaintiffs to adduce conclusive or very strong testimony in support of it, were they entitled to abstain altogether from adducing any?

It is true, that it may be said that a communication, if any, from John Kiddell Dawson to the brokers, is a fact more peculiarly within his own knowledge, and of which the burthen of proof is therefore by a general rule cast upon him; and this may be so. But the fact itself as already intimated, and as is indeed obvious, is immaterial, unless it be taken, that, independently of any communication from him, the brokers neither knew, nor had notice that he was a minor. The plaintiffs have indeed assumed throughout, that independently of any communication from John Kiddell Dawson, the brokers did not know and had not notice of his minority. But were they entitled to assume it? Is their ignorance of his minority to be presumed, unless the contrary be shewn? "*Qui cum alio contrahit, vel est, vel debet esse, non ignarus conditionis ejus.*" From this maxim of the civil law, as understood by the best commentators who say—" *Conditio accipitur pro statu: servus sit an liber: paterfamilias an filius-familias. Item significat aetatem mores, fortunam, valetudinem* "—I am not satisfied that, as a general rule, the law of England dissents. *Prima facie*, it seems less probable that a man should believe that which is not, than that which is, in the absence of any false assertion. Assuming, however, the possibility that there may be transactions in which the mere fact of a young man engaging himself may justify a belief in those with whom he deals that he is not a minor, I think that the case is not so with regard to transactions of the nature (I ought not perhaps to say the discreditable nature) of those which existed be-

tween the brokers in question and their unlucky customer. Adolescence is at least as much the age of gambling as any other.

The answer of John Kiddell Dawson contains these statements. [His Honor here read the statements of the answer, commencing in page 93; observing, however, that he was aware that part only was read in evidence for the plaintiffs (a). He then read the evidence of the defendants' witnesses, (see ante, p. 99,) and proceeded as follows:]

Why is the Court to conclude that the brokers, in the circumstances of such a case as this, did not know or believe the truth? Nor perhaps will it be out of place here to refer to the judgment of a distinguished judge in a well-known criminal case. Lord *Tenterden*, in *Rex v. Burdett* (b), says, "A presumption of any fact is, properly, an inferring of that fact from other facts that are known; it is an act of reasoning: and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but, if no fact could be thus ascertained by inference in a court of law, very few offenders would be brought to punishment. In a great portion of trials, as they occur in practice, no direct proof that the party accused actually committed the crime is or can be given: the man who is charged with theft is rarely seen to break the house or take the goods; and, in cases of murder, it rarely happens that the eye of any witness sees the fatal blow struck, or the poisonous ingredients poured into the cup. In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction.

(a) The portions read in evidence were, from the commencement in page 93 to the asterisk in page 95, and also some subse-

quent passages as to the execution of the deed, &c.

(b) 4 B. & Ald. 161, 162.

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No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily; but, in matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required or expected."

Now treating Lord *Tenterden's* observations as applicable to this case, in which, though civil, the charge is, that a minor was guilty of fraud, it may be asked whether the facts proved between him and the plaintiffs do not, in the absence of explanation or contradiction, warrant a reasonable and just conclusion that the brokers were not unaware of the minority of their youthful looking townsman, whom they were in the habit of seeing and talking and dealing with, the son moreover of a merchant of the same town. I am not prepared to say that they do not warrant such a conclusion. And I repeat that the question of communication or no communication from him to them does not, as I conceive, become material, or arise, until their ignorance without such a communication has been proved or assumed. As, however, it may be questionable whether it ought to be inferred between these parties, that during the transactions in question, or any part of them, Messrs. Middleton & Barber thought John Kiddell Dawson under age, or had notice of his minority, I proceed, to consider the plaintiffs' last position, their contention, namely, that on the assumption of the young man's acquaintance with his minority, and with the law on the subject, and also of the

broker's belief during their dealings with him, that he was not a minor, as well as of his omission to communicate to them the fact that he was a minor, there was a fraud on his part, for which, notwithstanding his infancy at the time, he became or was after his majority, and is, answerable in equity. This is, as I consider, a question of importance and general interest. The civil law, defining "*dolum malum esse omnem calliditatem, fallaciam, machinationem, ad circumveniendum, fallendum, decipiendum alterum, adhibitam,*" says, (the language is that of *Ulpian*), "*Item in causæ cognitione versari Labeo ait, ne in pupillum de dolo detur actio, nisi forte nomine hereditario conveniatur. Ego arbitror et ex suo dolo conveniendum, si proximus pubertati est, maxime si locupletior et hoc factus est.*" And the Digest proceeds in the words of *Paulus*: "*Quid enim si impetraverit à procuratore petitoris ut ab eo absolveretur; vel si de tutore mentitus pecuniam accepit; vel alia similia admisit, quæ non magnam machinationem exigunt?*" Then *Ulpian*: "*Sed ex dolo tutoris si factus est locupletior puto in eum dandam actionem. Sicut exceptio datur.*" And unquestionably it is the law of England, that an infant, however generally for his own sake protected by an incapacity to bind himself by contracts, may be *doli capax* in a civil sense, and for civil purposes, in the view of a court of equity, though perhaps only when *pubertati proximus* or older, and not, I suppose, at so early an age as in a criminal sense, and for criminal purposes, and may therefore commit a fraud for which, or the consequences of which, he may after his majority be made civilly answerable in equity. I am not now speaking of cases in which infants, if liable at all, are liable at law only, or in which adults, if suable in respect of acts done during infancy, are suable at law only. But as far as equity is concerned, the practical application of the rule or doctrine to which I have been just referring must not seldom, I conceive, be matter of much delicacy and difficulty. I agree with a learned author,

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who says, that in what cases in particular a court of equity will thus exert itself it is not easy to determine.

Nor indeed is the jurisdiction of equity the only jurisdiction where difficulties on this subject have arisen, or may arise: courts of law have not been free from them. The capacity of infants to commit crimes, their punishableness for criminal offences, their liability civilly for various wrongs not connected in any sense with contract, as for instance, battery and slander, to say nothing of the clear right in some circumstances to maintain trover against them, are of universal recognition. But questions which have not been considered free from difficulty have arisen, whether or how far persons are civilly liable at law for wrongs, or such acts as, if they were the acts of adults, would be wrongs, done during infancy when connected, or supposed to be connected, with contracts. The case of embezzlement by the servant or apprentice, *Bristow v. Eastman* (a); that of detinue in New Reports, *Mills v. Graham* (b); and an old case in Roll. Abr., tit. "Court de Admiraltie," with regard to an infant master of a ship, are instances of this kind, in which the objection of minority did not prevail: while in other instances of the class, as the case of *Johnson v. Pie* (c), reported by *Levinz*, *Siderfin* and *Keble*, where it was ruled that an action of deceit would not lie for a false assertion by the defendant, when an infant, that he was of age; the case mentioned in *Keble* of an assertion by an infant that a false jewel not belonging to him was a diamond and his own; the case of the infant innkeeper, mentioned in Roll. Abr., tit. "Action sur case;" and, in modern times, *Jennings v. Rundall* (d), the case of overriding a hired mare; and *Green v. Greenbank* (e), the case of exchanging mares, where the infant falsely

(a) 1 Esp. 172; Peake, N. P. Keb. 905.
 C. 223. (d) 8 T. R. 335.
 (b) 1 N. R. 140. (e) 2 Marsh. 485.
 (c) 1 Lev. 169; 1 Sid. 258; 1

warranted his mare to be sound, well knowing her to be unsound, the objection of minority has prevailed.

A case (a) also, in which an infant was plaintiff, may be mentioned, as tending much in the same direction; the plaintiff having recovered, though her conduct, if not fraudulent, was very near it or like it. In 3 *Keb.* 369, it is thus mentioned. "In trespass by infant, by guardian, the defendant pleads that the plaintiff was above sixteen years old, and agreed for 6*d.* in hand, that the defendant have licence to take two ounces of her hair, to which the plaintiff demurred, and *per curiam*, it is no plea; for the infant cannot licence, though she may agree with the barber to be trimmed: and judgment for the plaintiff." The same case in Bacon's *Abr.* is thus: "In trespass *quare vi et armis insultum fecit, et totum crinem capitis ipsius Annæ abscidit*, the defendant, as to all the trespass *præter tonsuram crinis*, pleads not guilty, and as to that, pleads that the plaintiff was of the age of sixteen years, and for a certain sum of money *licentiavit* the defendant *duas uncias crinis dictæ Annæ detondere et abscindere*; and upon the demurrer to this plea, the Court held that the contract was absolutely void, and consequently the tonsure unlawful, and gave judgment accordingly for the plaintiff.

Now, in these instances, in which minors succeeded at law, could there have been interposition against them in equity—a jurisdiction, generally at least, equally considerate with courts of law in favour of infants? Fraud certainly is odious, and to be repressed: but neither is protection to be withheld from the imbecility of youth. Is not allowance to be made for its exposure and obnoxiousness to influence and temptation and seduction, especially in a state of legal nonage? Very young men may be defrauded into committing frauds. *Velle non creditur qui obsequitur imperio patris*, is not with us legally but is sometimes morally true. Lord *Eldon*, in *Jackson v. Hobhouse* (b), with reference to the case of a married woman (who may, we know, as well

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(a) *Scraggan v. Sewardson*, 3 *Keb.* 369.

(b) 2 *Mer.* 483.

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as an infant commit a fraud), glances at the possibility of a husband compelling his wife to join in a fraud; and may not some consideration be had for a boy hampered in the toils of a designing and experienced man of mature age? By the last sentence, however, I do not wish to be understood as describing or referring to the present matter. As to which, though I do not say that the whole account given, whether accurately or inaccurately, by the young man upon oath, in his answer, of the commencement and progress and nature of the connexion and dealings between him and Messrs. Middleton & Barber, is in evidence against the plaintiffs, yet I cannot but see that the bill might have been amended after the answer; and that with such an answer before the plaintiffs, they have only adduced the evidence which they have, so far as they have adduced any evidence.

The story told by the answer is, in substance, that this young man had unhappily permitted himself so far to abuse the confidence of his father, to whom he was cash-keeper, as to misapply some sums, not of very inconsiderable amount, belonging to the father; that the son was anxious to make good this loss; that in this condition having met Mr. Cobb, a clerk of Messrs. Middleton & Barber, and afterwards Mr. Middleton himself, at the office of Mr. Surridge, through whom or by whose means or assistance the defalcation had been created, the youth was struck by Mr. Cobb's and Mr. Middleton's representations of the certainty, or probability at least, of profit to be derived from gambling or speculating (whichever it ought to be called) in shares in public undertakings; and upon these representations, with a view to deliver himself from his difficulties, engaged in the series of transactions which ended in a manner that it scarcely required inspiration to foretell. If this story is substantially true, or even substantially true so far as it agrees with Messrs. Middleton & Barber's representation of the matter, if Mr. Rodick's description of the young man's personal appearance is substantially accurate, and if

Mr. Middleton or Mr. Barber, knowing (as probably they did know) that the boy had a father living in Liverpool, allowed him to engage in such dealings, and continue them, without making a communication to the father, or asking a question of him (and no such communication or question appears there to have been), it may be difficult to account satisfactorily for the conduct of Messrs. Middleton & Barber, and as difficult to think it likely that they should have been defrauded by the lad, to whom, assuredly, the materials before the Court do not enable me to ascribe the wisdom of a serpent, if they do not require me to believe his innocence to have been that of a pigeon. If the brokers and their adventurous young principal were not on equal terms, there seems little difficulty in the way of saying which was probably the weaker party. Apart, however, from any peculiarity of circumstances, the plaintiffs seem substantially to contend for not less than this general proposition, that if a minor deals in a matter of contract with a person, who, having no notice of the minority, does, without any representation to him on the subject, believe the minor to be of full age, the minor is, after his majority at least, answerable in equity to that person for the contract or the consequences, or liable in equity to be compelled to restore him to his original position. Not referring, as I do not refer, to a case of necessities, or any case where the law permits an infant to contract, or any case where the point is purely and merely legal, I am not aware that such a proposition is founded in principle, or supported by authority that binds the Court. It seems to me full of danger and evil,—as was said at law in a case already mentioned, where it was held that an action of deceit would not lie upon an assertion by a minor that he was of full age. *Johnson v. Pie* (a) is thus :—“ *Action sur le case pur deceit fuit*

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(a) 1 Siderfin, 258; S. C. 1 Lev. 169, 1 Keb. 905.

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*port, et plaintiff declare que la fuit comunicacion inter le defendant et luy concernant lending al defendant £300. Et sur ceo defendant affirme al plaintiff, que fuit de pleine age, sur que le plaintiff lend a lui le argent. Et prist son security lou in verity il ne fuit forsq. 20 et halfe. Et issint il void son security demesne, et le plaintiff p'de son argent. al damages, etc. Et apres verdict pur plaintiff, fuit move in arrest de judgment que le acc' ne gist. Et judgment stay, et ore fuit move arrere pur judgment, et diversity pris inter torts et contracts des infants, car coment infants ne serront lie p' contracts unc' serront lie pur torts. (Dyer, 105.) Sedper cur: coment infants serront lie p' actual torts, come trespass, etc., queux sont vi et contra pacem unc' ne serront lie p' ceux q' sound in deceit, car si serront, tous les infants in Angleterre serront ruine, et in cases lou lour contracts ne euz lie serront ch' come pur tort." The case of *Clark v. Cogley* (a) was clearly, I think, decided correctly; nor do I doubt that the decisions in *Watts v. Creswell* (b) and *Savage v. Foster* (c) were required by the particular circumstances of those cases. In the latter, Mr. and Mrs. Foster might have barred her title by a fine; it was, I suppose, considered that she did not act in the fraud under his control or influence; and Williams had married on the faith of the transaction. In *Watts v. Creswell*, the minor must, I suppose, have been considered as not having acted under his father's control, or under such influence as to excuse him. In each of the cases the fraudulent conduct seems to have been of a most grossly dishonest nature, so gross as perhaps to have been obnoxious to criminal proceedings. Lord Cowper, in *Watts v. Creswell*, says, "If he was made a party to the deed, and sealed it, yet that would not bind him."*

And here, perhaps, it may not be quite out of place to remember Lord Hardwicke's remarks on the differences be-

(a) 2 Cox, 173. (b) 9 Vin. Ab., tit. "*Enfant*," N. pl. 24, p. 415.

(c) 9 Mod. 38.

tween the disabilities of infants and married women, which he made in *Hearle v. Greenbank* (a).

Of *Esron v. Nicholas* (b), decided by Lord King, I may, perhaps, be allowed to say, that the report in 2 Eq. Ca. Abr. does not appear to me satisfactory. I venture to think that the case as there stated does not afford a sufficient foundation for the decree that was made; and I may possibly be permitted to say the same of the case as it appears in the Registrar's book (b), which, however, does not give the pleadings at length or shew what the evidence was; nor, probably, without an examination of the pleadings and proofs, is it possible to form a just opinion of Lord King's decree, which gave no costs. I collect that the lease there was made more than three if not four years before the defendant's majority, and that his age had not been misrepresented, but was known from the beginning to the plaintiff. Perhaps it may have been proved, that the defendant had fraudulently represented Hall to the plaintiff as able to grant the lease, or that the defendant, at or after his majority, had received the fine, or its value. Upon the decision in *Cory v. Gertchen* (c), and the dictum in *Overton v. Banister* (d), by two judges of great weight and consideration, I think it not necessary to express, and I do not intimate, any opinion. Each of them is distinguishable from the present case. By neither of them, nor by the case *Ex parte Watson* (e), is it, as I conceive, rendered incumbent on me to give to the present plaintiffs a decree against John Kiddell Dawson.

The case last mentioned, to which reference was particularly made in *Belton v. Hodges* (f), a case that occurred more than twenty years afterwards in C. B., is reported

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(a) 3 Atk. 695.

(b) 2 Eq. Ca. Ab. 489, nom. *Esron* and *Nicholas et al.* The extract from the Registrar's Book of the case of *Esron v. Nicholas*, above referred to, will

be found at the end of the report of the present case.

(c) 2 Mad. 40.

(d) 3 Hare, 503.

(e) 16 Ves. 265.

(f) 9 Bing. 365.

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by Mr. *Vesey, ex relatione* merely, but it is probable not incorrectly. I have read the original affidavits on which the petition was heard. By declining to supersede the commission, Lord *Eldon* did not prevent the petitioner from disputing its validity at law, or a court of law from treating it as invalid; nor does there appear reason to suppose that Lord *Eldon* was asked or would have consented to interfere against the petitioner, for the purpose of enforcing against him submission to the bankruptcy.

Goode v. Harrison (a) may be thought a remarkable case; but, if not opposing, it does not, I think, support the plaintiffs' contention against the younger Dawson. If that action had been by an unpaid vendor of some of the goods supplied in April, 1818 (which was, I suppose, the date of the letter described in the report as dated in April, 1819), and not by a vendor of goods sold more than six months after Bennion's majority (the case, in all other respects, being as it stood, in fact), could there have been judgment against Bennion at law; and if there could not, would there have been any title to relief against him in equity? In my opinion, (I repeat), the notion of charging a man in equity after his majority, upon a purchase or sale or contract made during his minority, merely because, without any false assertion by him, the other party believed that he was not a minor, believing so on the ground that adults only could with propriety have such dealings, is contrary to principle, is of dangerous consequence, and is not established by authority.

There may be a want of delicacy, or indeed of morality, in the conduct of a young man of twenty buying a picture or a statue upon credit, without mentioning his age; but laws cannot vindicate every deflection from propriety; and it must be preferable, surely, that men of full age, in or out of trade, should sometimes suffer for acts of carelessness or imprudence, than that there should be given the obvious facility and plain encouragement to minors

(a) 5 B. & Ald. 147.

to be their own destroyers, and to others to make them a prey, which would be afforded by the rule that mutual silence, with an appearance of manhood, should expose a boy, upon the ground of fraud, to be fixed after his majority with the most rash and foolish contracts, or with the liability to restore money wasted in childish extravagance. "*Nulla lex satis commoda omnibus est; id modo quæritur, si majori parti et in summam prodest.*"

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In the cause now before the Court, John Kiddell Dawson's legal title is sought to be taken from him on the ground of a sale during his infancy, in respect of which he has not received nor is to receive the purchase money. There seems reason to believe that the purchase money went into the hands of Messrs. Middleton & Barber, towards satisfying a pecuniary demand of greater amount than they had, or alleged themselves to have, against him; but in respect of which it is probable, if not certain, that he could not have been sued. And relief against Messrs. Middleton & Barber cannot be given in this suit, constructed as it is. Their right was and is to be dismissed from it. On the whole, if it be assumed, that from the beginning to the end of the year 1842, they and the plaintiffs, and Mr. Hoole, and Messrs. Ewart & Bell, believed John Kiddell Dawson to be of full age, and had no reason to suspect the contrary, the case is still not one in which, either upon principle, or upon such authority as binds, independently of principle, the Court, it ought, in my judgment, to pronounce that a fraud has been committed by him in respect of which relief in equity should be now given against him.

It follows, that I must think it unnecessary, for the purpose of any question of relief, to decide whether his father has any lien upon the shares, or any interest in them. Without determining that point, I conceive that the bill ought to be dismissed against the Dawsons, with costs as to the father, without costs as to the son, and without prejudice to an action or any other suit.

1733.

April 18th.

Between WILLIAM ESRON (a) - - - Plaintiff.

GEORGE NICHOLAS, Esq., and
NICHOLAS SILVER - - - Defendants.

The guardian of A. B. (an infant) appointed by the Ecclesiastical Court, grants a lease of the infant's lands, receiving a premium, and at the time of granting the lease the infant is present, and represents to the lessee that the lessor is his guardian.

The infant is also an attesting witness to the lease. He attains his majority, and then grants a lease of the same lands to another lessee. On a bill filed by the former lessee against A. B. and the new lessee, to have the first lease confirmed, or the premium refunded, with interest—a decree made according to the latter alternative of the prayer.

THIS cause coming on this present day to be heard and debated before the Right Honourable the Lord High Chancellor of Great Britain, in the presence of counsel learned on both sides, the substance of the plaintiff's bill appeared to be, that, in October or November, 1726, the defendant Nicholas (then an infant) and Joseph Hall, Esq., his guardian, proposed leasing out some glebe lands and tithes, which the defendant Nicholas held by lease for years determinable on lives; and the plaintiff, being possessed of lands contiguous, agreed with the said Hall and the defendant Nicholas upon the terms of a lease; and indentures of lease were accordingly ingrossed, dated the 21st day of November, 1726, and made between the said Joseph Hall of the one part, and the plaintiff of the other part: and it is thereby witnessed, that, as well in consideration of 157*l.* 10*s.* by the plaintiff in hand paid, as also in consideration of the rents and covenants, the said Hall thereby demised to the plaintiff all that parcel of the prebend of Whorwell, within the tithing of Bullington, in the county of Southampton, To hold from Lady-day, 1730, for twenty-one years, if the defendant Nicholas and one John Nicholas should so long live, under the yearly rent of £70, with a proviso for the plaintiff to enter on part of the said premises at Michaelmas next, before the commencement of the said lease; that the time and place for executing the said lease was fixed by the said Hall and the defendant Nicholas, at Egham, in Surrey, where the plaintiff accordingly came, and there paid the said 157*l.* 10*s.* to the defendant Nicholas; and the said Hall and Nicholas did both of them assure the plaintiff that the said Hall was the defendant Nicholas's guardian, and had full authority to grant the said lease to the plaintiff; and the said plaintiff hath been also informed by other persons, and believes it to be true, that the said Hall was his guardian, and had power to grant such lease as aforesaid, and the plaintiff hoped to have quietly enjoyed the demised premises; but the said Hall being since dead, and the defendant Nicholas intending to defraud the plaintiff of the said 157*l.* 10*s.*, endeavours to avoid the plaintiff's said lease, pretending that Hall was not his guardian, but that one John Dodd was his guardian, and that Hall never paid over the said 157*l.* 10*s.* to him: that the defendant Silver has brought actions at law against the plaintiff and his servants for a trespass on entering on the said premises; whereas the plaintiff charges that he treated as well with the defendant Nicholas as with the said Hall, and nothing was done therein but

(a) See *ante*, p. 115.

what the said Nicholas was privy to ; and he was not only present when the plaintiff paid the said money, but also received the whole money himself from the plaintiff, and the said defendant subscribed his name as a witness to the said lease and receipt for the consideration-money, which being received by the said defendant and the said Hall signing the lease, the plaintiff, at that time taking notice thereof, was told by the said defendant that it was only for form sake, and that, as the lease was in the name of Hall, it was proper Hall should give the receipt for the consideration thereof ; notwithstanding which the defendant Nicholas would now avoid the said lease, and sell the same to the defendant Silver. Therefore, that the defendants may answer the matters aforesaid, and that the defendant Nicholas may either confirm the plaintiff's lease, or repay the said 157*l.* 10*s.*, which the plaintiff paid as the consideration of the said lease as aforesaid, with interest, and to be relieved, is the scope of the bill. Whereto the counsel for the defendant alleged that the defendant Nicholas, by his answer, sets forth that he is the son and heir of John Nicholas, clerk, who was seised of the said premises, and that, on his father's death, he became seised thereof : that the said Joseph Hall took out administration to his the said defendant's father, and was also chose guardian to him the said defendant by the Ecclesiastical Court : that, under colour of such administration and guardianship, he let leases at low rents for long terms, and received considerable fines thereon, which he converted to his own use, and died insolvent, indebted to him the said defendant. That the plaintiff, in July, 1726, came to the said Hall's house, where he the said defendant lived, and there proposed to the said Hall to take a lease from him of the said premises at Bullington, and to give the said Hall 157*l.* 10*s.* as a fine for the same, and which the said Hall accepted of, in order to get so much more of his the said defendant's money into his hands, and hath thereby defrauded both the plaintiff and him the said defendant : that no part of the said money was ever paid to him : that neither he nor the said Hall applied to the plaintiff to take a lease of the premises ; but admits Hall did grant such lease as aforesaid, and that he was prevailed upon by Hall to go with him, and meet the plaintiff at Egham, where the said lease and counterpart were executed ; and that the plaintiff did pay to the said Hall the sum of £105, and not 157*l.* 10*s.* ; but he heard Hall say, that he had about half a year before received of the plaintiff 52*l.* 10*s.* Denies any of the money ever came to his hands ; admits he told the plaintiff Hall was his guardian, but did not tell him his guardian had power to grant such lease, neither had he such power, as he the said defendant is advised ; and insists, that he the said defendant not having received any part of the said consideration-money, he shall be at liberty to avoid the same, as by law he can, and the rather in regard the said premises were underlet. That Hall

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continued his guardian to his death, when he chose the said Dod ; and insists that the plaintiff ought to seek for a satisfaction against the representatives of Hall. Admits his being a witness to the said lease and to the receipt thereon ; admits the defendant Dod did grant the defendant Silver's lease, with his consent and privity, from Michaelmas, 1729, for one year, and that he, the said defendant, coming of age the 19th December, 1730, did grant a lease to the defendant Silver ; and that he brought an action against the plaintiff, with his the said defendant's privity, and that he encouraged him therein, in order to avoid the plaintiff's lease ; and, in case the same is avoided, apprehends he may lawfully let the said premises for such fine and rent as he shall think reasonable. And the defendant Silver sets forth, that the defendant Nicholas attaining his age at the time aforesaid, did let a lease of the premises to him ; admits he heard the plaintiff had a lease from Mr. Hall, and that he hath brought such action as aforesaid to try the validity of the plaintiff's lease, but that the same is at his own expense. Whereupon, and upon debate of the matter, and hearing the said lease (signed by Joseph Hall), dated the 21st of November, 1726, the receipt thereon for 157*l.* 10*s.*, the defendant's answer, and the proofs taken in the cause, read, and what was alleged on both sides : and the defendant Nicholas refusing to confirm the said lease to the plaintiff :—his Lordship doth order and decree, that the said defendant do repay to the plaintiff the said sum of 157*l.* 10*s.*, the fine on granting the said lease, with interest at the rate of £4 yearly for £100 from the time of payment thereof, to be computed by Robert Holford, Esq., one of the Masters of this Court, if the parties differ in the computation thereof ; and no costs are to be paid on either side.—Reg. Lib. 1732. A. fol. 313.

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Feb. 9th.

HABERSHON v. BLURTON.

IN February, 1836, the plaintiff and the defendant became partners, as printers, for seven years, from March, 1836. The defendant was to manage the trade, and receive a weekly stipend. The plaintiff was exempted from personal superintendence of the business. In the years 1836, 1837, and 1838 the plaintiff brought into the business £280. In 1838, the defendant brought in £200.

Effect in equity of an execution against the share of one of two partners in the partnership stock.

In the year 1841, a judgment having been recovered against the plaintiff, the sheriff, under the writ of *fi. fa.*, sold the plaintiff's share and interest in the effects of the partnership to one Emanuel Pearson for £200. And by deed, dated the 10th May, 1841, reciting that the sheriff had entered upon and taken possession of "all the share and interest of the said Charles Habershon, as partner with one John Blurton, of and in all the book debts, materials, tools, types, implements, printing furniture, goods, chattels, effects, and stock in trade, used in the said business, which had been valued at £200," the sheriff thereby assigned "all the share, right, and interest of him the said Charles Habershon, of and in all and every the debts, furniture, chattels, and effects so seized under and by virtue of the said writ of *fi. fa.* as aforesaid, and held by the said Charles Habershon in partnership or joint tenancy with the said John Blurton; to have and to hold, receive and take, the said share, furniture, debts, goods, chattels, and effects thereby bargained and sold, or intended so to be, unto the said Emanuel Pearson, his executors, administrators, and assigns, as his and their own proper debts, goods, and chattels."

On the 30th September, 1841, Pearson assigned the same share, right, and interest to the defendant.

The bill represented that the sale was made by the sheriff to the defendant, and it charged that the plaintiff

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had, after the said pretended sale, the same interest in the partnership as he previously had, subject only to the debit to the plaintiff in the partnership account of the amount paid to the sheriff in satisfaction of the judgment; that, at the time of the purchase, there was a much larger sum due to the plaintiff than had been paid to the sheriff; that, at the expiration of the seven years, the business was still carried on with the joint assets, and that more than £450 was due to the plaintiff at the time of the sale; that the sale by the sheriff was not pretended to be a sale of all the plaintiff's interest in the good-will and assets of the partnership, but was expressly limited to his interest in the stock-in-trade; and that, even if it had purported to extend to the whole interest, still, under the circumstances, the plaintiff was entitled to the benefit of the purchase: and, further, that, even if the execution and sale operated as a dissolution, which the plaintiff did not admit, it did not deprive him of his right to an account of the dealings and transactions of the partnership, or his right to receive what might be due to him, or his right to a share in the assets, as they then existed.

The bill prayed that the plaintiff might be declared entitled as before stated, or to a decree for a dissolution; or, if the Court should be of opinion that the partnership was already dissolved, to a declaration to that effect. The bill also prayed an account of all dealings and transactions, and payment of what, on taking the accounts, should be found due to the plaintiff.

The defendant, by his answer, submitted that the partnership was dissolved on the 10th May, 1841, and that he was absolutely entitled, as against the plaintiff, to the whole of the plaintiff's share and interest in the partnership property and effects; and that he, the defendant, was not bound to account in respect thereof, and that nothing was due to the plaintiff in respect of the partnership business.

Mr. *Swanston* (with him Mr. *Lloyd*), for the plaintiff.—It is submitted, that the rights of the plaintiff and defendant, as partners, continue the same, except that the defendant is entitled to credit for £200 on taking the accounts. When the sheriff, in April, 1841, levied execution, he seized, it is true, the stock in trade and other tangible property, and sold them for £200; but he seized only that which was capable of seizure, and he could only pass by the assignment that which he had seized: *Johnson v. Evans* (a). Neither the book debts nor the good-will of the trade could be seized. The plaintiff, therefore, is clearly entitled to the accounts; and it is submitted also, that he is entitled to a decree for a dissolution. The motive of the defendant in buying was to get rid of the plaintiff as a partner. Such a transaction cannot be held to have the effect of a sale to a third party. The assignment can only stand as a security for the money advanced; at the date of it the partnership was indebted to the plaintiff.

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Mr. *Russell* and Mr. *J. T. Humphry*, for the defendant.—There is no attempt in the pleadings to impeach the assignment as fraudulent. The property was valued, and no question is raised by the bill as to the valuation. The effect of the assignment was to pass all the interest of the plaintiff. Conceding, for the sake of argument, that the book debts could not be seized, yet they would be applicable to the purposes of the partnership. The execution-creditor would have a right to say, that that which he had no right to touch should be applied in discharge of the partnership liabilities. The doctrine of marshalling applies in such a case: *Dutton v. Morrison* (b), *Chapman v. Koops* (c), *In re Wait* (d).

(a) 7 Man. & G. 240.
(b) 17 Ves. 193.

(c) 3 Bos. & P. 289.
(d) 1 J. & W. 605.

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Mr. *Swanston*, in reply.—The execution-creditor can get no more than he seizes. In order to admit the principle of marshalling, the creditor must be entitled to the entire property under the execution. That is not so here, for he is limited to the value of a moiety of the chattels seized; though no doubt the moiety is subject to a lien. The consequence is, that the execution-creditor has been fully satisfied. The accounts, however, must be taken, in order to ascertain the amount of lien on the debtor's moiety.

The VICE-CHANCELLOR.—Circumstanced as this case is, I am of opinion, without any doubt, that the execution and assignment by the sheriff effected a dissolution of the partnership. Notwithstanding, however, that dissolution, and notwithstanding the seizure by the sheriff, and the language of the assignment by him, I am of opinion that it is still possible, in point of strict right, that something may, on the result of an account or an inquiry, appear to be coming to the plaintiff. I am of opinion, therefore, that his strict right is not to have the bill dismissed without deciding what, by law, it was or was not in the power of the sheriff to seize. The plaintiff is entitled to an inquiry of this description: a reference to the Master to inquire what were the particulars of the stock in trade, debts, and effects and liabilities at the time of the dissolution; what debts were then due to the partnership; what was then due by the partners to the partnership; what, if anything, has been received in respect of the partnership, and by whom and how the same has been applied; and whether the debts and liabilities of the partnership at the time of the execution have been discharged, and by whom.

HOLROYD v. WYATT.

1847.

Feb. 24th &
25th.

MR. PIGGOTT on behalf of a purchaser under the decree, moved for leave to pay into court, on the 10th of March, the amount of his purchase-money and interest, deducting from the latter the income tax. The whole purchase-money was £900; £180 had been paid as a deposit; the balance due, added to 1*l.* 4*s.*, the amount of the valuation of the fixtures, was, consequently, 721*l.* 4*s.*, on which, according to the conditions of sale, interest was payable from December 25th, 1845, to March 10th, 1847. Deducting the income tax, the amount of the interest was 42*l.* 1*s.* 9*d.*, and the motion was for liberty to pay in 763*l.* 5*s.* 9*d.* The 5 & 6 *Vict.* c. 35, s. 102, provides, that, upon all annuities, yearly interest of money, or other annual payments, whether such payments shall be payable as (among other things specified in the act,) a personal debt or obligation by virtue of any contract, and whether the same shall be received and payable half-yearly, or at any shorter or more distant time, there shall be charged the tax therein mentioned. And the 103rd section provides, that, if any person shall refuse to allow any deduction, authorized to be made by the act, out of any payment of annual interest of money lent, or other debt bearing annual interest, whether the same be secured by mortgage, or otherwise, he shall forfeit for every such offence treble the value of the principal money or debt.

Where interest is payable on purchase-money upon a sale by order of the Court, the purchaser must pay the full purchase-money and interest into court, without deducting the income tax.

Mr. *Spence*, for the vendors.—The act does not touch the case. The interest payable is in the nature of damages for non-payment of the purchase-money at the stipulated time. It can in nowise be considered an annuity, yearly interest of money, or other annual payment.

Mr. *Piggott*, in reply, contended, that the interest was

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yearly interest of money payable as a personal debt, by virtue of a contract, viz. the conditions of sale.

The VICE-CHANCELLOR, after consulting the Registrar, said, he was informed that the practice was universal in the office not to deduct the property tax in such orders. Suppose the maker of a promissory note, or the acceptor of a bill of exchange, not to pay the amount for which it was drawn at the day appointed, but to pay it afterwards, with interest, could he deduct the income tax? And was not that case similar to the present in principle? His Honor, however, thought it unnecessary to give any opinion on the point, inasmuch as he was not prepared to introduce a new practice into the office.



Feb. 24th.

SEWELL v. GODDEN.

Where a subpoena to answer an amended bill had been served on defendant's solicitor:—*Held*, that an appearance could not be entered by the plaintiff for the defendant, under the 29th Order of May, 1845.

ONE of the defendants had appeared to the original bill, and had gone to reside in New Zealand. Afterwards, the plaintiff amended his bill, and served upon the defendant's solicitor a subpoena to answer the amended bill under the 26th Order of the 8th of May, 1845, which provides, that service upon the defendant's solicitor of a subpoena to answer an amended bill, shall be deemed good service upon the party.

Eight days having elapsed since the service on the solicitor, and no appearance having been entered, the present application was made for leave to enter an appearance for this defendant, under the 29th Order of the 8th of May, 1845, which provides, that, if the defendant is, within the jurisdiction of the Court, duly served with a subpoena to appear to or to appear to and answer a bill, and refuses or neglects

to appear thereto, within eight days after such service, the plaintiff may, after the expiration of such eight days, and within three weeks from the time of such service, apply to the record and writ clerk to enter an appearance for such defendant; and, no appearance having been entered, the record and writ clerk is to enter such appearance, upon being satisfied by affidavit that the subpoena was duly served upon such defendant personally, or at his dwelling-house or usual place of abode, and after the expiration of such three weeks, or after the time allowed to the defendant, has expired, in any case in which the record and writ clerk is not by the order required to enter such appearance, the plaintiff may apply to the Court for leave to enter such appearance for such defendant; and the Court being satisfied that the subpoena was duly served, and that no appearance had been entered for that defendant, may, if it so thinks fit, order the same accordingly.

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Mr. *Chapman Barber* appeared in support of the motion.

Mr. *Schomberg*, *amicus curiæ*, referred to *Marquis of Hertford v. Suisse* (a).

The VICE-CHANCELLOR said he should follow that authority, and refused the motion.

(a) 13 Sim. 489.

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*Feb. 24th &
27th.*

TOWNE v. BONNIN.

Traversing note
taken off the
file at the in-
stance of the
defendant,
asking for leave
to put in his
answer after
replication.

THIS was a foreclosure suit. The bill was filed on the 3rd of December, 1846. Application was unsuccessfully made to the Master on the part of the Defendant, to extend the time for answering, and no answer was filed.

On the 3rd of February, a traversing note was filed, and replication was filed on the 4th.

Mr. *Rasch*, on the part of the defendant, now moved that the traversing note might be taken off the file, and that the defendant might be at liberty to put in his answer, which had been ready on the 5th of February. He cited *Rigby v. Rigby (a)*.

Mr. *Egan*, for the plaintiff.—The Master refused to extend the time for answering, having all the facts before him, and the Court will not in substance review his decision, without a proper case being made. Besides, the application is too late after replication has been filed.

The Court ordered the traversing note to be taken off the file, and that the defendant should put in his answer on or before the 2nd of March, and should pay the costs of the application and of his contempt in not putting in his answer.

(a) 6 Beav. 265.

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JOHNSON v. BARNES.

Feb. 24th.

MR. LEWIS, on behalf of the defendant, moved that the copy and service of a subpoena issued in the cause, purporting to bear date, October 30th, 1846, might be discharged with costs, and that an order of the 14th of December, 1846, that the plaintiff should be at liberty to enter an appearance for the defendant, might also be discharged with costs.

A defendant served with an irregular copy of a subpoena to appear and answer, has a right to have such service discharged with costs, if he applies speedily; and he may be heard upon entering a conditional appearance with the Registrar.

The defendant had been served on the 2nd of November, 1846, with the copy in question of the writ of subpoena to appear to the plaintiff's bill, but the copy was not indorsed with the name and place of residence of the plaintiff's solicitor, according to the provisions of the 3rd and 4th Orders of December 21st, 1833.

The defendants neither appeared nor took any step upon this service; and, on the 14th of December, the Court, on the application of the plaintiff, and upon an affidavit of the service upon the defendant of the copy of the subpoena, stating it to have been indorsed, made the order for the plaintiff to enter an appearance for the defendant, according to the 29th Order of May, 1845, and a copy of this order was served on the defendant; but no appearance was entered under the order.

Mr. Fooks, for the plaintiff, took a preliminary objection, that, as no appearance had been entered for the defendant, he could not be heard.

Mr. Lewis said, it would be sufficient to enter an appearance with the Registrar now, and cited *Mackreth v. Nicholson* (a).

(a) 19 Ves. 367.

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The VICE-CHANCELLOR gave the defendant leave to enter forthwith a conditional appearance with the Registrar: whereupon such conditional appearance was entered accordingly in Court.

Mr. *Fooks* then argued, that, according to *Price v. Webb* (a), the omission to indorse the copies of the subpoena did not render the process irregular or void, although the Court might withhold the benefit of the subpoena from the plaintiff, until it had been regularly served. All that could be said was, that there had been no service. The circumstance that the service was in fact a mere nullity, formed no ground for bringing the plaintiff before the Court by this motion. If it were otherwise, the defendant, by allowing three months to elapse, and by permitting the plaintiff to proceed to obtain the order for entering an appearance, had precluded himself from making this application.

The VICE-CHANCELLOR:—

If a defendant is served with a copy of a subpoena, which is irregular by reason of the omission of the indorsement or indorsements required by the Orders of the Court, the process of the Court has been irregularly used, and it is the right of such a person, however irregular the service may be, if he applies speedily, to come here and to have the service discharged or set aside with costs.

It appears, however, that the service took place in November, and the present application is not made until February, a delay requiring apology, which might have induced the Court to decline interfering upon the present motion. The delay, however, has been accounted for; and as to the order obtained by the plaintiff, it improves the defendant's case, inasmuch as it shews that the service in

(a) 2 Hare, 511.

question, which is contended to be a mere nullity, has been made the ground of an irregular order. The service and the order must be discharged with costs, as well as the conditional appearance now entered by the defendant.

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COLLIS v. ROBINS.

Feb. 25th.
March 5th.

THOMAS COLLIS, by his will, dated May 13th, 1845, gave and devised to John Robins and Benjamin Robins a freehold messuage and land, and all other his real estate, upon trust for sale, as soon after his decease as they should think proper, and to stand possessed of the money to be so produced, and of the rents of the real estate in the meantime, upon trust to pay the testator's debts, and also the trustees' costs, charges, and expenses; and then upon trust to pay to two nieces of the testator £500 each absolutely; and upon further trust to place out another sum of £500, and to invest the same; and then the testator proceeded to declare the trust of the third legacy of £500, and of his residuary personal estate, and otherwise, in the following words:—"And upon further trust, from time to time, to receive and afterwards pay or otherwise apply the whole of the dividends or interest (as the case may be) of the said sum of £500 unto Miss Susannah Brett, daughter of the late Mr. William Brett, of Stone, banker, deceased, for and during the term of her natural life; and from and after her

A testator devised his real estate to trustees in trust for sale, and out of the proceeds and out of the rents till sale, to pay his debts and the trustees' costs, charges, and expenses, and then upon trust to pay three legacies of 500*l.* each; and as to all his personal estate and effects, the testator gave the same to T. R., his executors, administrators, and assigns:—

testator's real estate, after paying the charges which ought to be considered as imposed thereon; and that such surplus belongs to the heir-at-law.

Held, secondly, that, as between the heir and T. R., the personal estate is the fund first applicable to the payment of the testator's debts.

Semble, that the 3 & 4 Will. 4, c. 104, ought to have some influence in favour of the exoneration of the personal estate.

It was conceded *arguendo*, that funeral expenses and costs of probate were not included in the costs, charges, and expenses of a testator's trustees.

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decease, then upon trust that they, my said trustees, and the survivor of them, and the executors and administrators of such survivor, do and shall pay and transfer the said sum of £500, and the stocks, funds, and securities respectively, on which the same shall be invested ; and also the dividends, interest, and income thereof, which shall become due, after the decease of the said Susannah Brett, unto my godson, Thomas Robins, son of the said John Robins ; and as to, for, and concerning all and singular my ready monies and securities for money to me belonging, and all other my personal estate and effects whatsoever, and wheresoever the same may be at the time of my decease, I give and bequeath unto my said godson, the said Thomas Robins, his executors, administrators, and assigns. I give and devise all estates vested in me on any trusts, or by way of mortgage in fee, and which I have power to dispose of by this my will, with the appurtenances, unto the said John Robins and Benjamin Robins, and to their heirs, executors, administrators, and assigns, according to the respective natures and legal qualities of the same estates respectively, upon trust, to hold or dispose of the said trust estates in the manner in which they ought to be held and disposed of pursuant to the said trusts, and, upon payment of the money secured on mortgage, to convey or assign the estates in mortgage to the person or persons entitled thereto for the time being." The will then contained the usual trustees' receipt clause, and clauses for the indemnity of the trustees ; and the testator appointed the said John Robins and Benjamin Robins executors.

The testator died in October, 1845, and his will was proved in February, 1846.

The present suit was instituted by William Blow Collis, the testator's heir-at-law, against the devisees in trust and executors of the will, and Thomas Robins, who was the infant.

And the bill charged, that, inasmuch as the testator's will contained no disposition of the surplus of the produce of the sale of the testator's real estate, the plaintiff, as the testator's heir-at-law, was entitled to the surplus, after payment of the legacies bequeathed by the will out of the produce of the real estate, and such of the debts of the testator as his personal estate would be insufficient to satisfy; and the prayer was, that declarations and accounts might be made and taken accordingly.

The questions of importance raised on this will were the following:—

First, whether the proceeds of the testator's real estate, subject to the charges and legacies thereon, were undisposed of by the testator's will, in which case it was not questioned but that the plaintiff would be entitled to them as the testator's heir-at-law; or whether they were included under the residuary bequest to the infant defendant.

Secondly, whether the testator's debts, and the costs attending the execution of the trusts of the testator's will, and his funeral expenses, were chargeable on the testator's personal estate as a primary fund, in exoneration of the proceeds of the real estate; or whether they were chargeable on the proceeds of the real estate under the trusts of the testator's will.

Mr. *Wigram* and Mr. *Pryor*, for the plaintiff, contended, that he, as heir, was entitled to have the personal estate exhausted in payment of all debts and legacies in his favour, unless the language of the will were clearly sufficient to exempt the personal and charge the real estate; *Brummel v. Prothero* (a); and they distinguished the present case from *Greene v. Greene* (b). In *Brydges v. Phillips* (c), the Court admitted that there was certainly room for conjecture, that the testator did mean to throw the whole of his

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(a) 3 Ves. Jun. 111.

(b) 4 Madd. 148.

(c) 6 Ves. 567.

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debts on his real estate, yet, it being only a probable conjecture, and there being no certainty, no clear unambiguous intention to that effect to be collected from the whole will, the Court held it insufficient to exempt the personal estate. The trusts of this will, as to the real estate, are, to pay debts, then for sale, then to pay three legacies; and there the trusts end. The testator then proceeds, "And as to, for, and concerning all and singular my ready money," &c., being wholly confined to his personal estate; which leaves this case to be governed by *Brydges v. Phillips*.

They also quoted *Duke of Ancaster v. Mayer* (a), *Doe d. Tofield v. Tofield* (b), *Bootle v. Blundell* (c), *Driver v. Ferrand* (d), *Blount v. Hipkins* (e), *Burton v. Knowlton* (f), *Phillips v. Phillips* (g), and *Aldridge v. Lord Walscourt* (h).

Mr. Hodgson and Mr. Follett, for the infant defendant Thomas Robins, contended, that the residue of the personal estate, and, subject to the charges thereon, that the produce of the sale of the real estate, passed by the will to him; and that the gift to the infant was sufficiently large to include the proceeds of the real estate as well as the mere personal estate of the testator. They cited *Doe d. Tofield v. Tofield* (b); also a case decided in the Exchequer about ten years since, of *Cogan v. Stevens* (i). They suggested that there was not, in *Brummel v. Prothero*, in *Brydges v. Phillips*, or in *Aldridge v. Lord Walscourt*, any direction for the conversion of the real estate, which would distinguish those cases from the present. But if the Court should hold the heir to be entitled to the proceeds of the sale of the real estate, still, at least, the personal estate is claimed for the infant clear of debts and

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| (a) 1 Bro. C. C. 454. | (f) 3 Ves. 107. |
| (b) 11 East, 246. | (g) 1 Myl. & Ke. 681. |
| (c) 1 Mer. 193; S. C., 19 Ves. | (h) 1 Ball & Bea. 312. |
| 494. | (i) Lewin on Trustees, 2nd |
| (d) 1 Russ. & My. 681. | edit. p. 719. |
| (e) 7 Simons, 43. | |

legacies. Some of the charges, which would otherwise fall on the personalty, are, by the will, charged on the realty. The question is, what was the testator's intention? The old rule was, that, unless there were express words discharging the personalty, the personal estate should not be exonerated. Then it was held that any expressions, however slight, might charge the realty and exonerate the personalty. Under the law, as at present settled, the rule requires a plain intention to be extracted from the whole will to charge the realty in exoneration of the personalty. It is, therefore, contended, that what is charged on the realty must be taken as a discharge of the personalty. The rule is, that a plain intention, satisfactory to the mind of the judge, should appear: *Duke of Ancaster v. Mayer* (a). The case most like the present, is *Greene v. Greene* (b). We do not contend that the funeral expenses should be borne by the real estate, conceding that they cannot be considered as part of the expenses of the trust in the words of the will; but, to the extent of the debts, the intention is to exonerate the personal estate; and this Court should give effect to such intention.

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Mr. Bacon and Mr. Bentinck, for the trustees.

Mr. Wigram, in reply.

The following cases were also cited or referred to in the course of the argument:—*Ackroyd v. Smithson* (c), *Samwell v. Wake* (d), and *Michell v. Michell* (e).

The VICE-CHANCELLOR:—

I have read attentively this will, upon which two ques- March 5th.

(a) 1 Bro. C. C. 454, see p. 460.

(b) 4 Mad. 146.

(c) 1 Bro. C. C. 503.

(d) Id. 144.

(e) 5 Mad. 69.

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tions only were raised. As to one of them, I think that the will does not give to Thomas Robins, and does not dispose of, the surplus of the beneficial interest in the produce of the testator's real estate, after paying the charges which ought to be considered as imposed upon it, according to the true construction of the instrument; and that the surplus, therefore, if any, belongs to the plaintiff, as the heir.

The other question, that, namely, whether the real estate or the personal estate is the fund first applicable to the payment of the testator's debts, (for the personal estate has not been argued not to be the first fund for paying the funeral expenses and the expenses of proving the will in the Ecclesiastical Court), has appeared to me one of more difficulty; upon which, it had occurred to me to doubt whether a statute, that relieved our law from a great discredit (I was nearly saying scandal), the act, namely, of 1833 (3 & 4 Will. 4, c. 104), ought not to have some influence, so as possibly to render a decision since the act in favour of the personal estate against the real estate right, which, before the act, would have been erroneous. I cannot, however, venture to say, that, in the present instance, at least, I ought so to view it; though, certainly, where a testator dies solvent, a charge of his debts upon his real estate by his will is at present of little or no materiality, so far as his creditors are concerned, who need scarcely care whether the real assets are legal or equitable, if they are in either case sure of payment; a remark subject, of course, to this, that the state of the property may be such as to render material the question whether the assets are equitable; and to this, that a creditor may, after his debtor's death, be barred by delay as to a remedy against his personal estate, without being so against his real estate, in certain circumstances; and it is to be recollected that what is now true of the real estate of all deceased debtors, was, for more than twenty-five years before 1833, true of the

freehold estates of debtors, who were, at their deaths, in trade.

The particulars of the will here are soon stated. It is dated in 1845. All the real estate is devised to John Robins and Benjamin Robins, in trust to sell. The proceeds of the sale, and the rents in the meantime, are directed to be applied, "in the first place, to pay and satisfy all debts due and owing" from the testator at the time of his decease to any person or persons whomsoever, and then to pay the trustees all costs, charges, and expenses attending the execution of the trusts thereby created, or in relation thereto, and then to pay to each of two nieces of the testator, whom he names, £500, and then to invest £500, of which he directs the interest to be paid to a third lady for her life, and the capital to be, after her decease, paid to his godson, Thomas Robins, (son of one of the trustees). The will concludes in the following words: "And as to, for, and concerning all and singular my ready monies, and securities for money to me belonging, and all other my personal estate and effects whatsoever, and wheresoever the same may be at the time of my decease, I give and bequeath unto my said godson, the said Thomas Robins, his executors, administrators, and assigns. I give and devise all estates vested in me on any trusts," &c. (His Honor here read the clauses in the will containing the devise of trust and mortgage estates). Thus, therefore, it appears that the devisees in trust are the executors, are the only executors: that there is given to the heir (the plaintiff in the cause) nothing; but to his daughter, one of the testator's two nieces, a sum of £500: that, as to the beneficial interest in the produce of the real estate, there is an original intestacy, not wholly but partially (at least, as it seems, without much or without any doubt to me); that there is one universal legatee of the personal estate; that he is neither a trustee nor an executor, but is one of the four persons among whom the beneficial

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interest, in the produce of the real estate, is given, so far as the testator has disposed of it; and that, unless under the words "all costs, charges, and expenses, attending the execution of the trusts hereby created, or in relation thereto," or the words "all loss, costs and charges, and expenses, they or he shall bear or be put unto, in the execution of this my will, or in relation thereto," (expressions in construing which, attention ought, I suppose, to be given to the places in which they are found upon the will respectively), it is clear that the instrument does not in terms notice, does not expressly refer to, any payment or deduction, as to be made out of the personal estate, and I suppose equally clear that the expenses of the funeral, and of proving the will in the Ecclesiastical Court, are not charged on the real estate, or made payable out of its proceeds. Whether this circumstance, whether the fact that this particular will does not in terms call the gift of the personal estate residuary, or a gift of a residue, ought, upon the question of exoneration, to be deemed of weight on either side, may perhaps be questionable. It has, however, been judicially said, that a testator's acquaintance with the law is to be presumed; and certainly it is very plain, that whatever was the testator's right of arranging the order and mode in which the different portions of his property should, as between themselves, be applied, it was beyond his power to exempt his personal estate from liability to his creditors at least, if not from that and other liabilities, and beyond his power also to prevent his executors from acquiring the property in it, or to enable Thomas Robins, without their assent, or the assistance of a court of equity, to obtain any benefit from it. A testator, also, knowing the law, would know the difference between legal and equitable assets.

I need not say whether, independently of authority, I should have thought it right, or probably right, to treat the instrument before me as exhibiting an intention of exonerating the personal estate from the debts; for the ques-

tion of exoneration has arisen upon so many wills, has presented itself in such a variety of forms and circumstances, and is so ancient and almost so familiar a grievance of the Court, that authority upon it is abundant. The accumulation, indeed, of cases, with the different views taken by different judges of the effect of particular phrases or provisions, has tended, I suppose of necessity, to embarrass the question, and this must probably be thought somewhat an unruly quarter of the law. On the whole, however, some principles of interpretation with reference to the point under consideration, have been finally recognised and established, which, whenever the point arises, are to be kept in view and not intentionally abandoned.

But still, with reference to the true construction and effect of such a will as this, the authorities cannot, I think, be represented as uniform or harmonious, and I have had, therefore, to consider whether those against or those for the plaintiff, as the testator's heir, preponderate.

The reported cases, more or less directly in point, which have been decided within the last 150 years, would, extracted from the many volumes containing them, and collected, form together, I do not say a great evil, but a great book. It appeared to me, upon this occasion, that I might content myself, in addition to *Bootle v. Blundell* (a), with consulting particularly *Lord Inchiquin v. French* (b), *Duke of Ancaster v. Mayer* (c), *Webb v. Jones* (d), *Burton v. Knowlton* (e), *Brummel v. Prothero* (f), *Brydges v. Phillips* (g), *M'Clelland v. Shaw* (h), *Watson v. Brickwood* (i), *Tower v. Lord Rous* (k), *Greene v. Greene* (l), *Michell v. Michell* (m), *Driver v. Ferrand* (n), *Blount v. Hipkins* (o),

(a) 1 Mer. 193.

(b) Amb. 33.

(c) 1 Bro. C. C. 454.

(d) 2 Bro. C. C. 60.

(e) 3 Ves. 107.

(f) 3 Ves. 111.

(g) 6 Ves. 567.

(h) 2 Sch. & Lef. 538.

(i) 9 Ves. 447.

(k) 18 Ves. 132.

(l) 4 Madd. 148.

(m) 5 Madd. 69.

(n) 1 Russ. & My. 681.

(o) 7 Simons, 43.

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and *Lamphier v. Despard* (a). Having done this, and having done so with the conviction that I should be in error were I to depart from any principle or rule which, in the course of the judgment in *Bootle v. Blundell*, (a judgment containing various observations having, as I think, a particular bearing as well as a bearing generally on the present case,) Lord *Eldon* recognised or laid down, I have arrived at the conclusion that the preponderance of authority is in favour of the heir upon the point of exoneration.

Among the propositions which, in the case that I have first mentioned, were stated by the great judge who decided it, are these (b): "I can find no rule deducible from all that has been said on the subject but this, (which appears to be a rule supported by all the cases taken together), namely, that since it has been laid down that express words are not necessary to exempt the personal estate, there must be in the will that which is sometimes denominated 'evident demonstration,' sometimes 'plain intention,' and 'necessary implication,' to operate that exemption. Thus much can be collected from the cases; but when you proceed further, and inquire what it is that constitutes this evident demonstration, plain intention, or necessary implication, it does appear to me that Lord *Alvanley* is right, when he says, 'You are not to rest on conjecture, but the mind of a judge must be convinced that he is deciding according to what the testator intended.' The expression 'necessary implication' is frequently applied to cases between a devisee and heir-at-law; and yet there is hardly a case decided against an heir-at-law where the implication, upon which it was so decided, was of absolute necessity. It is but a loose way of defining this expression, to say that the intention must be so probable, that the judge cannot suppose the contrary; and it seems strange to lay down as a rule that express words shall not be required, but yet that there must be expressions tanta-

(a) 2 Dr. & War. 59.

(b) 1 Mer. 219, 220, 221.

mount to express words. I take it that this is what will be found to be the result of all the cases, that the judge is in every instance to look at the whole of the will together, and then ask himself whether he is convinced that it was the testator's intention to exempt his personal estate. Many rules are clear and positive. First, it is certain that, in equity as well as at law, the personal estate is first liable, and that the amount of the personal estate, whatever it may be, makes no difference in the case. That was not so, however, according to the old decisions, as I shall have occasion to point out to you presently. I take it to be certain, also, that it is not enough for the testator to have charged his real estate with, or in any manner devoted it to, the payment of his debts; that the rule of construction is such as aims at finding, not that the real estate is charged, but that the personal estate is discharged. Then, on the question whether the personal estate is discharged or not, I apprehend it will be found that the very same circumstances have, in the minds of different judges, led to different conclusions; and this is the result to be drawn from the most diligent comparison of all the cases."

And he afterwards says again, "It is not by an intention to charge the real, but by an intention to discharge the personal estate, that the question is to be decided" (*b*).

Applying this test or these tests to the present will, and recollecting what has been determined in other cases of which the authority is unquestioned, I am unable to say that this testator's personal estate is not to be subjected to his debts in its ordinary course and common order; and here I may observe, that the present Lord Chancellor, in a case before him, in 1838, thus expressed himself: "We must presume that the testator was cognizant of the rule of law, and if he knew the law at all, he must have known that he could not exonerate the personal estate from the burthen of

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his debts, unless he so expressed himself as to lead the Court to the fair conclusion, from the language which he used, that such was the intention which he meant to express" (a).

It being clear, that, upon those who allege a testator's personal estate not to be the first fund for paying his debts, lies the burthen of shewing that, in so many words or by expressions tantamount, he has directed his personal estate not to be so, and that they must do more than bring his meaning into doubt, I do not find it possible (considering the state of the authorities) to declare that the legatee of the personalty has, in the present instance, done this.

I must decide in the heir's favour, therefore, both the points that have been argued; though my decision would, I very much suspect, be altogether reversed by the testator, if he could sit in judgment on his will. But, as Lord *Eldon*, in a case that I have several times mentioned, said, "After all, the question is not what the testator really meant, (which can never be ascertained), but what he has authorized the Court to say it is probable was his meaning" (b).

The decree must, in other respects, be one very much of course.

(a) *Bickham v. Cruttwell*, 3 Myl. & Cr. 772. (b) 1 Mer. 237.

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MOREAU v. POLLEY.

Feb. 26.

JACOB SALVADOR, by his will dated June 15th, 1849, gave to Marguerite Moreau an annuity of £400 for her life; and he directed his executors to set apart a sufficient sum to answer the annuity; and he gave all the residue of his personal estate and effects, subject to the payment of his debts and legacies and of the said annuity, to and between five persons, of whom Madame Castro Caroline de Vigneron was one.

Form of stop-order when husband and wife join in an assignment of the wife's reversionary chose in action.

A suit having been instituted by the annuitant, a sum of 13,333*l.* 6*s.* 6*d.* £3 per cent. Consols was, in pursuance of the decree, invested in the name of the Accountant General, in trust in the cause, to answer the annuity.

At the respective dates of the testator's will and of his death, Madame Vigneron was the wife of Monsieur Vigneron, and resided with him at Paris.

On the 1st of August, 1846, Monsieur and Madame Vigneron duly, according to the laws of France, executed a deed or instrument of assignment, and thereby, for valuable consideration expressed to be paid to them, they assigned the one-fifth part in reversion belonging to Madame de Vigneron, in the said sum of 13,333*l.* 6*s.* 6*d.* stock, to George Lewis Blanchett, subject to the annuity.

Mr. Blanchett now presented his petition for the usual stop-order.

Mr. *Lovat* appeared in support of the petition, which was consented to on the part of Monsieur and Madame Vigneron.

The VICE-CHANCELLOR.—In the absence of any information as to what is the husband's right in the fund, according to the laws of France, I can only deal with this as an assignment of the husband's chance of surviving his wife.

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Though the prayer of the petition is that the fund be not transferred without notice to the petitioner, I do not think it right to embarrass the lady in case she should survive her husband, with the condition of giving the petitioner notice of any application to this Court in respect of the fund, when, it may be, that he will not be to be found.

The order was, that, during the life of the husband, the fund should not be transferred or disposed of without notice to the petitioner.

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In a creditor's suit for the administration of the assets of an intestate who had joined in a bond as a surety, the bond-creditor, being aware of the suit, omitted to prove till the time limited by the advertisements for creditors to come in had expired; a decree on further directions had been made, the administratrix had admitted assets, and the principal debtor in the bond had become bankrupt:—

BROWN v. LAKE.

RICHARD LAKE died on the 12th of May, 1842, intestate, leaving Henry Lake, an infant, his heir-at-law, and Frances Lake, his daughter, who, being of age, obtained letters of administration to his effects.

Shortly after the death of Richard Lake, Burton Brown, a simple contract-creditor of the intestate, instituted a suit on behalf of himself and all other the creditors of the intestate, against the heir-at-law and administratrix for the administration of the intestate's estate; upon which the ordinary decree in a creditor's suit was made on the 27th of May, 1843, directing the usual accounts of the intestate's personal estate and effects, and of his debts, and the Master was to cause the usual advertisements for creditors to be published, and it was ordered that in case the intestate's personal estate should be insufficient to pay his debts, the

Held, that he might still be let in upon terms, the fund remaining undistributed.

An admission of assets by the administratrix, embodied in an order made on a petition in the cause, qualified by a declaration in a subsequent order. Arrangement of priorities between simple contract creditors coming in within the time limited by the advertisements and bond-creditors coming in subsequently.

Master should ascertain and state of what real estates the intestate died seised, and whether the same were encumbered, and what rents had been received in respect of the said estates, and how the same had been applied.

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The Master, after causing the usual advertisements to be published for creditors to come in, and after the expiration of the time limited by the advertisements, made his general report, dated the 20th day of May, 1845, whereby it appeared that the intestate's personal estate was insufficient for the payment of his debts by 4,580*l.* 17*s.* 1*d.*

On the 28th of June, 1845, the cause came on for further directions; when an order was made for the sale of the real estates.

In pursuance of this order, the real estates were put up for sale by public auction on the 26th of August, 1845, when part only of them was sold, the biddings for the remainder not having reached the reserved price.

An agreement was however entered into between the plaintiff and a creditor named Stracey Lake, who had proved under the decree for 5,609*l.* 5*s.* 4*d.*, for the sale to the latter of the remaining real estate for £2,800, to be paid or retained out of the debt of 5,609*l.* 5*s.* 4*d.*

By an order made on the petition of the plaintiff, dated the 4th November, 1845, after stating an admission on the part of the administratrix, that there were sufficient assets to satisfy the claims on the intestate's estate, it was ordered that Mr. Stracey Lake should be the purchaser of the freehold and copyhold hereditaments and premises mentioned in the petition, at £2,800, and should be at liberty to retain that amount in part discharge of the debt proved by him against the estate. The purchase was completed accordingly.

The present application was a petition of a Mr. Howard, who now for the first time sought leave to go in before the Master and prove as a creditor, after the time limited

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by the Master's advertisements for the purpose had expired, and after the above proceedings in the suit.

The intestate, it appeared, was co-obligor with, and as surety for, a Mr. Quincy, in a bond to the petitioner, and, until recently, Mr. Quincy had paid the interest regularly, the petitioner, though knowing of the suit and the advertisements, apparently trusting Mr. Quincy alone.

In January, 1847, Quincy became bankrupt, and thereupon the present petition was presented, praying that the petitioner might be at liberty to go in and prove the bond-debt in this suit.

The petition was opposed on the part of the plaintiff and Mr. Stracey Lake, on the grounds that the petitioner was throughout well aware of the suit and the object of it; that the solicitor of the plaintiff was the son of the petitioner, and his general solicitor as well as his solicitor in the matter of the debt now in question, and had been in actual communication with the petitioner, as to the payment of the debt by Quincy, and had even actually received for him a large part of it. That, notwithstanding these circumstances, no claim upon the said bond had been made on the part of the petitioner against the estate of the intestate, and that the suit and proceedings, of which the petitioner was aware, amounted to a requisition on the part of the estate of the said intestate to him, to claim his debt if it was still due from the estate to him. It was further submitted, on the part of those respondents, that if the petitioner should establish his debt, the intestate's estate would not pay a dividend of more than about 12s. in the pound to the creditors; that Quincy was in good credit up to December, 1846, and, if required by the petitioner, could and would have paid the bond-debt; and, moreover, that if the petitioner had proved or claimed any debt against the estate of the intestate upon the bond, the

amount would have been demanded from Quincy, and, if necessary, payment thereof would have been enforced from him by the plaintiff on behalf of himself and the other creditors.

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Mr. *Wigram*, Mr. *Bacon*, and Mr. *Loudon*, in support of the petition.—In *Lashley v. Hogg* (a), Lord *Eldon* said, that though the time limited by the advertisements had elapsed, yet the Court would let in creditors at any time, whilst the fund was in Court. While the fund remains distributable, and until actual distribution, the creditor is entitled to come in for his share. *Gillespie v. Alexander* (b), *Eyre v. Everitt* (c), and *Ex parte Day* (d) were also quoted.

Mr. *Rolt* and Mr. *Goldsmid*, for the administratrix.—We admit the rule, that the creditor has a right to come in whilst the fund is in Court; but it is a rule subject to conditions and qualifications. One condition is, that the creditor coming in must shew that he has made no unnecessary delay. Again, in this suit, after the Master's report was made, the administratrix admitted assets, and the order of the 4th of November, 1845, was obtained. The petitioner knew of this suit by his solicitor, and, by determining not to prove, waived his right to prove on the bond. *David v. Frowd* (e), and *Sawyer v. Birchmore* (f), which were cases of next of kin coming in late under a decree, shew that there must not be laches in a party claiming to be admitted after the time limited.

In the rule contended for, what is meant by actual distribution of the fund? It means the first act of distribution,

(a) 11 Ves. 602.

also 7 Ves. 301.

(b) 3 Russ. 130.

(e) 1 Myl. & K. 200.

(c) 2 Russ. 381.

(f) 2 Myl. & Cr. 611.

(d) Mont. & M'A. 208. See

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and not any intermediate period before final distribution. It is attempted to support the claim of the petitioner by the rule in bankruptcy as to distribution ; but the rule there does not govern the rules of distribution in this Court. In *Cattell v. Simons* (a), though the fund was in Court undistributed, yet a petition to amend an erroneous charge brought in by a creditor, under a decree in an administration suit, was dismissed. In the present case, the administratrix, acting under an impression produced in consequence of the laches of the petitioner, has contracted an engagement, from which the Court cannot relieve her. The party guilty of laches must, in such a case, be the party to suffer: *Brooking v. Jennings* (b). If, however, the petitioner is let in to prove his debt, the administratrix must be allowed to withdraw the admission of assets which she made, owing to his laches. They also cited *Norman v. Baldry* (c) and *Richards v. Brown* (d).

Mr. Russell and Mr. G. L. Russell, for the plaintiff in the cause.—The petitioner cannot come in and prove without altering rights which he has no pretence for altering. The admission of assets by the administratrix, and the purchase, proceeded upon a supposed state of facts believed to exist, owing to the laches of the petitioner. Rights were thus created which will be prejudiced if the petitioner is allowed to come in ; and the petitioner has no right to interfere with the contract entered into with the purchaser.

The order now sought to be disturbed was made in 1845, and it is not until 1847, and upon Quincy's bankruptcy, that the petitioner asks to take from the plaintiffs in the cause the benefit of the admission of assets by the administratrix, and from the defendant the benefit of cir-

(a) 8 Bea. 243.

(b) 1 Mod. 174.

(c) 6 Sim. 621.

(d) 3 Bing. N. C. 493 ; 4
Scott, 262.

cumstances which alone induced her to make the admission. They also referred to *ex parte Mure* (a).

Mr. *Wigram*, in reply.

The VICE-CHANCELLOR:—

If the order had here been a decree on further directions within the ordinary meaning of that expression, as used for purposes like the present, I should still have thought the mere circumstances that the fund was in Court, and that the creditor was aware of the suit, and with that notice abstained from applying in the suit, were not sufficient of themselves to exclude him from the right to apply to this Court for relief, the fund remaining undistributed. But in the present case the suit has not advanced so far; because, although there has been one hearing on further directions, yet all that was done upon that occasion (material for the present purpose) was to direct the real estate to be sold, and the accounts to be continued; and the order did not direct either apportionment or payment to any person.

The only point upon which my mind has laboured, has been,—whether there was the probability of a case being established of this description, that the creditor and his solicitor had so conducted themselves as to occasion a course to be taken with regard to Quincy rendering it not just against others to interfere upon the present occasion.

Now, not only is that not directly asserted anywhere, but it must be remembered that there is no ground whatever upon the evidence for saying that Mr. Howard, the creditor, had done any act to preclude himself from claiming. If he was at any time in a condition to claim, it was incumbent upon those who knew that he was in such a condition to remember that circumstance, and to act accordingly; and if, without any express assurance, they chose to rely on this, that a man who might claim, and who had not barred him-

(a) 2 Cox, 63.

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self from claiming, would not claim, they must abide by the consequences. It seems to me, therefore, that I must give the creditor an inquiry as to the debt, he paying the costs of the petition, and undertaking to abide by any order that the Court may think fit to make as to subsequent costs, and with respect to Mr. Stracey Lake's purchase.

The order was—That it should be referred to the taxing master to tax Stracey Lake, and the defendant, Frances Lake, and Stracey Lake, the infant, their costs of the application; and it was ordered that the petitioner, William Howard, should pay such costs, when taxed; and the petitioner, by his counsel, undertaking to abide by any order which the Court might think fit to make as to any subsequent costs, it was ordered that the petitioner should be at liberty to go in before the Master, under the decree made in this cause, dated the 27th of May, 1843, and establish and prove such debt as he might be able against the estate of the intestate; and the said petitioner, by his counsel, undertaking also to prove such debt as aforesaid against the estate of William Quincy under the fiat in bankruptcy issued against him, and to abide by any order which this Court might think fit to make touching any dividend to be recovered under such proofs. It was declared, that the admission made by the defendant, Frances Lake, the administratrix of Richard Lake, the intestate, in the pleadings named in the order dated the 4th day of November, 1845, mentioned, should be taken as an admission of the sufficiency of the estate, except so far as any deficiency might be occasioned by the petitioner's claim. And it was

declared, that, notwithstanding the establishment of any specialty debt by the petitioner, the retainer by Stracey Lake of the £2,800, as directed by the order dated the 4th of November, 1845, was not to be disturbed; and that the creditors were entitled to receive the same dividends in respect of their debts as they would have been entitled to receive if the said sum of £2,800 had been paid into the Bank to the credit of this cause; and that, in calculating the dividends to which the said Stracey Lake would be entitled in respect of his debt, the said sum of £2,800, retained by him pursuant to the said order, was to be treated as received by him on account of his dividend. And it was declared, that, notwithstanding the establishment of any such specialty debt by the petitioner, the creditors of the intestate, other than the petitioner, were to be entitled to receive the same dividends as if the payment allowed to the defendant, Frances Lake, the administratrix of the said intestate, in respect of the sum of 91*l.* 15*s.* 2*d.*, the £150, and the several debts, amounting together to 212*l.* 0*s.* 6*d.*, mentioned in the affidavit of Alfred Howard in this cause, on the 18th of February last, had not been allowed, and the creditors in respect of those debts had come in and proved and received dividends with the other creditors (a).

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(a) There was an appeal from cellor, by whom it was confirmed this order to the Lord Chan- on the 30th April, 1847.

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March 3rd.

WILSON v. WILSON.

A testator, by a will not executed so as to pass freehold estates, gave freeholds and copyholds to his brother, on condition of the latter joining the testator's nephew in the purchase of certain annuities, and gave to the nephew freeholds, leaseholds, and personality, on a similar condition.

The brother disclaimed:—*Held*, that the nephew must make provision for one-half of the annuities.

One of the annuities was directed by the will to be paid to the widow so long as she should live, and if she had any child born, such sum to be continued for its life. There were three children born:—*Held*, that the direction applied to the eldest only; and that, taking the annuity, she was bound to give effect to the other annuity, and to the gifts to the nephew as regarded the one-third share of freeholds which descended to her.

Bequest of £500, or an annuity of £25 for life:—*Held*, not to give the option to the legatee, but to the parties interested in the property, subject to the annuity.

THIS was a petition depending upon the construction of the following will, which was not attested by any witness:—

“This is the will of Charles Wilson of Gracechurch-street, made this 26th day of December, 1837. To my brother, Horace Hayman Wilson, I leave all and every part of my lands and buildings at Peldon, in the county of Essex, conditionally, that he grants to Charles Fiffin a lease of twenty-one years, at £200 per year; and, further, that he joins my nephew in purchasing the annuities hereinafter mentioned. To my nephew, Frederick Wilson, I leave my leasehold house in Gracechurch-street, with the business, stock, and outstanding debts, and also my freehold house at Stratford-green, conditionally, that he joins my brother in the purchase of the following annuities; namely, £100 a year to my wife, Sarah Amelia Wilson, so long as she live; and, if she has any child born, such sum to be continued for its life, such child to be the produce of our marriage. To my old and faithful servant, Sarah Hanley, £25 per year during her life, or £500 in money. To Maria Bardsley, the sum of £100, as a legacy. My plate and books I leave for my wife, with liberty to take as much furniture and linen as she may think proper, my nephew, Frederick Wilson, having the remainder. The cash in the house at the time of my decease, and my watches and trinkets, are also for my wife. These arrangements to be made as soon as possible after payment of my debts and funeral expenses.”

The testator died February 14th, 1847, leaving his wife and three daughters his only children and co-heiresses at law,

and also his co-heiresses according to the custom of the several manors of which the testator's copyhold estates were held.

The testator's widow died February 24th, 1846; and, four days afterwards, one of the daughters died an infant, leaving the plaintiffs, her sisters and co-heiresses at law, and also her co-heiresses according to the custom, and her sole next of kin.

The testator was, at the time of his decease, entitled in fee-simple to freehold and copyhold hereditaments at Peldon, in Essex, and also to a freehold messuage at Stratford-green, and he was also, at the time of his decease, possessed of the leasehold house in Gracechurch-street mentioned in his will, with the business, stock, and divers outstanding debts in such business; and he was also, at his decease, possessed of other personal estate and effects more than sufficient to pay his debts, funeral, and testamentary expenses, and legacies.

The plaintiffs submitted that they were entitled to have an annuity of £100 for their lives and the life of the survivor of them, purchased by Horace Hayman Wilson and Frederick Wilson.

Horace Hayman Wilson, however, by his answer, disclaimed all beneficial interest under the will; and Frederick Wilson contended, that, by reason of the will being ineffectual as regarded the devise of the said freehold estates, he was entitled to the copyholds, and to the leasehold house in Gracechurch-street, without any liability to purchase the annuities.

Mr. *Chandless* and Mr. *Begbie*, for the plaintiffs.—The nephew, Mr. F. Wilson, cannot take the benefit given him by the will, without purchasing the whole annuity thereby given for the benefit of the infants. The principle is the same as where estates are devised charged with a legacy, in which case the whole legacy must be paid, although half of

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the devise should fail: *Hooley v. Booth* (a), *Lushington v. Sewell* (b). Next, the gift of the annuity is to all the children, for it is obvious that the testator did not mean to assign it to any one.

Mr. *Bacon* and Mr. *Glasse*, for the legatee, Sarah Hanley, contended that, under the alternative words of the bequest, she was entitled to choose whether she would have £500 or £25 per annum, and she chose the former.

Mr. *Russell* and Mr. *Hargrave*, for the nephew, Mr. F. Wilson, cited *Broughton v. Broughton* (c), *Hearle v. Greenbank* (d), *Cary v. Ashew* (e), *Sheddon v. Goodrich* (f), *Brodie v. Barry* (g), and *Gardiner v. Fell* (h).

Mr. *Swanston*, Mr. *Malins*, and Mr. *Surrage*, appeared for other parties.

The VICE-CHANCELLOR :—

On this particular will, worded, as it is, in a very strange manner, I think that the testator must be considered as having meant to include the annuity of £25 per annum in the annuities which he directed his brother and nephew to purchase, and as having meant to give to them, and not to Sarah Handley, the option whether she should have £25 per annum for her life, or a single sum of £500—I say upon the language of this particular instrument.

The disclaimer of Mr. Horace Hayman Wilson does not, I apprehend, affect prejudicially any right or interest of Sarah Hanley or of Mr. Frederick Wilson.

(a) 2 Vern. 359.

(b) 1 Russ. & M. 169

(c) 2 Ves. 12.

(d) 3 Atk. 709; 1 Ves. 298.

(e) 1 Cox, 241.

(f) 8 Ves. 481.

(g) 2 V. & B. 130.

(h) 1 J. & W. 22.

I understand that the testator had three children by his wife, who is mentioned in the will; that he never had any other child; that the widow survived the testator, and is dead; that of the three children, of whom two are the plaintiffs, the youngest (also a daughter) died after her mother's decease; that the elder of the two surviving children was living when the will was made, though born afterwards; and that the testator left the three daughters his customary heirs, as well as heirs-at-law and sole next of kin.

In this state of things, I conceive that the annuity of £100 per annum ought to be considered as a subsisting annuity for the life of the elder of the two plaintiffs, and for that life only, and as belonging to her.

It being admitted on all hands that an annuity of £25 per annum for the life of Sarah Hanley is now, and was at the testator's death, worth considerably less than £500, I think that each of the two annuities must fall as to half upon the copyhold estate at Peldon, and as to the other half on Mr. Frederick Wilson, the gifts to whom, independently of the Stratford House, are, I suppose, worth considerably more than half the value of the two annuities. But I conceive that the elder plaintiff cannot claim the annuity of £100 per annum (as this particular will is worded), without agreeing to subject her original share of the freehold estate at Peldon to one moiety of both annuities in common with the copyhold estate there, and also to give up her original share, being one-third of the Stratford House, to Mr. Frederick Wilson absolutely.

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*March 9th
and 12th.*

Though a trustee for a public charity is not called on for twenty years by the body to whom he is accountable to account, yet it is his duty to tender his accounts to such body without requisition; and if he do not, he is liable to the costs of an information filed to compel an account; even although in the result the charity prove to be indebted to such trustee. A trustee for a charity, against whom an information was properly filed, made a case by his answer, from which it must have been manifest that the trustee was not a debtor to the charity, and that the result of taking the accounts would not be of advantage to the charity. A decree was nevertheless sought and obtained, directing the accounts to be taken:—*Held*, that no costs subsequent to the hearing ought to be given on either side.

ATTORNEY-GENERAL v. GIBBS.

MANY years ago certain messuages and hereditaments were, by gifts and devises, vested in trustees upon trust, for the general purposes of the parish of St. Stephen, Walbrook, London; and certain sums of money were also vested in the trustees for the same general purposes of the parish. Other messuages and hereditaments by gifts and devises became also vested in the trustees, for certain charitable purposes, other than those for which poor-rates and church-rates were applicable, such being, among other purposes, to buy bread for poor inhabitants, and for apprenticing out children of the parish.

In the year 1812, the defendant, Mr. Alderman Gibbs, and other persons, became the trustees; and all the hereditaments, as well those given and devised for parochial purposes as those given and devised for purposes other than those for which the poor-rates were applicable, and all the trust-monies, then amounting to 500*l.* 3*s.* 6*d.*, £3 per cent. reduced annuities, were vested in Mr. Gibbs and the other trustees; and the trusts of the rents, issues, and profits of all the said hereditaments, and of the dividends of the said sum of 500*l.* 3*s.* 6*d.* stock, were duly declared by deed.

In the year 1824, Mr. Gibbs and Mr. Atkins were appointed the churchwardens of the parish, and they continued to be regularly appointed such churchwardens until the year 1840, when Mr. Eddison was appointed churchwarden in the place of Mr. Atkins, and Mr. Gibbs and Mr. Eddison had ever since been annually re-appointed churchwardens. Mr. Whittaker had been for some years, and continued to be, overseer of the poor; the Rev. Dr. Croly, rector; and Dr. Croly and four other gentlemen had for some time constituted, and continued to be, the select vestry of the parish.

All the trustees appointed by the indenture of 1812 had

died previously to the year 1832, except Mr. Gibbs; and in or about the year 1832, he, as surviving trustee, entered into and had ever since continued in receipt of the rents of all the hereditaments, and of the dividends of the 500*l.* 3*s.* 6*d.* stock.

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Frequent applications were made by the inhabitants of the parish to Mr. Gibbs to render an account of his receipts in respect of the trust-funds, and of their application; but up to the time of the filing of the information and bill, he had never rendered any such account.

The churchwardens, overseers, and select vestrymen, claimed, as constituting the select vestry, to be the only persons who had any right to interfere in the affairs of the parish, or with the charitable and other property thereof.

In November, 1843, the present suit was instituted by information and bill, which was afterwards amended; and thereby, after stating the above facts, it was charged that a large sum was due from Mr. Gibbs, as trustee. The prayer was for an account of the hereditaments and monies, vested in Mr. Gibbs in trust for the parish, or for any charitable or public object within the parish, and also an account of his receipts and payments in respect of the annual produce of the same; and that what might be due from the defendant Gibbs might be invested; and that if anything were due to the defendant Gibbs, then that the same might be raised by sale of a sufficient part of the trust-funds. The information and bill also prayed for the appointment of new trustees, and for an injunction and receiver.

In December, 1843, and before putting in his answer, Mr. Gibbs laid his accounts before the select vestry, shewing a balance due to him of £1800. These accounts were approved by the select vestry, subject to an error of £70; and Mr. Gibbs then put in his answer, admitting that he was the sole trustee, and that his accounts had never been presented to the parishioners; but alleging that the select

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vestry, who as he insisted were alone entitled to require the production of his accounts, had never called for their production; nor had he therefore, in fact, ever produced his accounts to the select vestry, or obtained any audit or allowance of them prior to the date of filing the information and bill. He further alleged, that, upon an account of all monies received and paid by him being taken in all the trusts, a balance of £1800 would be found due to him; and stated that such accounts had been presented to the select vestry, and had been allowed, subject to the error as to £70, as above mentioned.

The other churchwarden, and the overseers and select vestrymen, by their answers, claimed the exclusive right to require Mr. Gibbs to account, and admitted that they had not called on him to do so prior to the time of the filing of the information, on account of their entire confidence in him.

Dr. Croly, as rector, claimed the parsonage-house and other rights under the trusts, of which he alleged he had been deprived.

A decree was made by the Master of the Rolls on the 9th July, 1844, referring it to the Master to take the accounts of the defendant Gibbs, and reserving all other questions.

The Master, by his report, dated the 10th May, 1845, found that he was unable to distinguish the payments made by the defendant Gibbs in any one year; but on a gross balance of receipts and payments he found that a sum of 592*l.* 14*s.* 10*d.* was due to the defendant Gibbs, on all the trust-accounts taken together; and as a special circumstance, the Master found that the defendant Gibbs had also paid, as in his answer stated, further sums of money, amounting together to 610*l.* 15*s.* 3*d.*, and had tendered to him vouchers for the same: but inasmuch as those payments did not appear to have been made for the use of the parish, he had disallowed the same.

The case now came on for hearing upon further directions and costs.

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Mr. *Swanston* and Mr. *Bates*, for the information and bill.—The effect of this suit has been to diminish the claim of the defendant Gibbs, as trustee, from £1800 to 592*l.* 14*s.* 10*d.* And as to that sum, Mr. Gibbs must lose it for his own negligence; for there can be no retrospective rate made for payment by the present parishioners of sums, which ought, if raisable at all, to have been levied year by year.

This suit was rendered necessary by the conduct of the defendants; for, when properly applied to for his accounts, Mr. Gibbs answered, that he was accountable to the select vestry only. The select vestry alleged, that, placing confidence in Mr. Gibbs, they did not call on him for his accounts. Lord *Eldon* has said, “A trustee should be ready at every hour to account.” Now, from 1825 till 1843 Mr. Gibbs has not accounted; he so blended the trust funds with his own, that they cannot be properly separated, and his claim for £1800 is reduced to 592*l.* 14*s.* 10*d.* It was proper, therefore, to have the accounts taken, and Mr. Gibbs should pay the costs, and directions should be given for continuing the accounts.

Mr. *Pryor*, for the defendant Atkins.

Mr. *Kenyon Parker*, for the Rev. Dr. Croly, the rector.

Mr. *Rolt*, for the defendant Ellison.

Mr. *Heathfield*, for the defendant Whittaker.

Mr. *Lloyd*, for the defendant Gibbs.—The information originally charged the defendant Gibbs with receiving the trust monies, and not applying any part; and the amended

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information charged that a large sum was due from him as a trustee. Mr. Gibbs' answer shews a large balance due to him, and yet the costs of taking the accounts are incurred. The original claim was correct in amount, and was paid by Mr. Gibbs; but he can establish effectually before the Master a part of it only. All the charges against the defendant Gibbs fall to the ground. As an accounting party Mr. Gibbs shews the parish to be indebted to him. The *Attorney-General* cannot now retire from the prayer in his information; and the defendant Gibbs submits that sufficient trust funds should be sold to discharge his balance, and pay his costs as between solicitor and client.

Mr. *Swanston*, in reply.

The VICE-CHANCELLOR :—

The accounts of the defendant, Mr. Alderman Gibbs, the trustee of certain property of the parish of St. Stephen, Walbrook,—accounts extending over twenty years—have been taken before the Master. In the result, nothing is found due from him, and, in one sense, a large sum is found due to him, that is to say, his expenditure for the parish, in respect of the trust, exceeds his payments by more than £500. However morally just may be his claim to that sum, I am of opinion that he must lose it.

In this case there was a trust to apply annual receipts to annual payments. There is neither fund nor personal liability for reimbursing Mr. Gibbs the excess of past annual payments over the past annual receipts; he must therefore lose the amount.

It is said, that he claimed before and after the institution of the suit a sum to which he is not entitled. It must be satisfactory to all to ascribe this to mistake and error, rather than to a want of integrity; it being probable, at least, that all that is claimed by Mr. Gibbs had been expended by him, though he may not be able to charge all the items to the

parish. There appears to have been no want of pecuniary honesty—but a mistaken course of action, to Mr. Gibbs' own disadvantage.

There is no satisfactory explanation why twenty years elapsed without Mr. Gibbs exhibiting his accounts; though the select vestry did not ask it, Mr. Gibbs ought to have produced them, the parishioners having a right to information upon the subject.

Mr. Gibbs must pay the costs of all parties to the suit, up to the hearing at the Rolls; the relator is to pay the costs of all the other defendants, (except the costs of the defendant Atkins), and to be repaid them by Mr. Gibbs. The defendant Atkins is neither to pay nor to receive costs.

Now, as to costs since the hearing: Mr. Gibbs' accounts had been then seen, and the persons interested must be taken to have then known that he was not a debtor to the trust, and that the result of taking the accounts would not be of advantage to the parish. The relator chooses, however, to take the accounts into the Master's Office. From the date of the decree I give no costs on either side.

With the consent of all parties, let the bill be dismissed, as against all the defendants, except Mr. Gibbs and Dr. Croly. Direct that Dr. Croly shall be paid the arrears due to him out of the rents, to the time of the decree; if there be any residue, let it be paid to Mr. Gibbs, towards discharge of the balance found due to him. The accounts to be continued—further directions and costs to be reserved (*a*).

(*a*) On an appeal by the defendant Gibbs, the Lord Chancellor affirmed the decree.

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Exceptions to answer will not be ordered to be taken off the file because the order of reference is not served in due time. But if the plaintiff serves the order after the time and obtains a warrant, the defendant is entitled to apply to the Court for his costs.

THE answer in this case was filed on January 27, and the plaintiff filed exceptions to it on the 23rd of February. On the 5th of March he obtained the usual order of reference, which, however, he did not serve till the 13th. He then served on the defendant the usual warrant to proceed upon the exceptions, and the defendant's solicitor attended accordingly at the Master's Office on the day appointed.

Mr. Russell and Mr. Heathfield now moved, on the part of the defendant, that the order of reference might be discharged, that the exceptions might be taken off the file, and that the plaintiff might pay the defendant's costs occasioned by the warrant. They referred to *Attorney-General v. Clark (a)*.

Mr. Miller, for the plaintiff.—This application is unnecessary and improper. It has been decided, that the circumstance of the order not being served within the prescribed time does not render the order itself irregular, or entitle the defendant to have it discharged: *Dalton v. Hayter (b)*: much less can it render the exceptions irregular, or form a ground for taking them off the file.

Mr. Russell, in reply, referred to *Hunter v. Capron (c)* and *Taylor v. Harrison (d)*.

The Vice-Chancellor.—How do you distinguish this case in principle from *Dalton v. Hayter*?

Mr. Russell.—The Lord Chancellor there said, at the end

(a) 1 Myl. & Cr. 367.

(b) 1 Phil. 515.

(c) 5 Beav. 93.

(d) 1 Myl. & Cr. 274.

of his judgment, that the Master would have to decide whether the order of reference had been served in time or not. It was therefore uncertain in that case, whereas it is here incapable of dispute that the exceptions were not duly proceeded with. Besides, there had been no proceeding there in the Master's Office. The order had not been acted upon.

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The *Vice-Chancellor* wished to hear Mr. *Miller* upon the part of the motion asking for the costs of the warrant.

Mr. *Miller* submitted that, as the order was not served within the term, the defendant ought not to have attended at the Master's Office, or taken any heed of the warrant.

The *Vice-Chancellor*.—But is it not now settled that a party unnecessarily served is entitled to the costs of appearing?

Mr. *Miller*.—That rule has only been established as to proceedings in Court.

The *VICE-CHANCELLOR*.—The Master's Office is a very important part of the Court. I think that the costs occasioned by the exceptions after the service of the order, but not including this motion, should be paid by the plaintiff. Upon the authority of *Dalton v. Hayter*, the order of reference cannot be discharged, nor can the exceptions be taken off the file. I never heard indeed of taking exceptions off the file because they were abandoned. I give no costs of this motion.

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May 4th, 5th,
& 25th.

CLOUGH v. RATCLIFFE.

A bill filed by certain members of a lodge forming part of an association called "The Independent Order of Odd Fellows," (which consists of many corresponding lodges and many thousand members,) against other members of the lodge, complaining of being excluded from the lodge, and praying for a declaration that such exclusion was illegal and void, and for an injunction to restrain the defendants from applying a sum of 148*l.* 3*s.* 4*d.* otherwise than according to the rules of the lodge, and for an account (if necessary) of all the property and funds of

the lodge, and a declaration of the rights and interests of the parties, and for all necessary directions for giving effect thereto, and for an injunction and receiver, and general relief:—*Held*, on demurrer, not to be a case in which an injunction would be proper without other relief, or without view to other relief.

Held also, that it does not belong to the functions of the Court to make a decree containing declarations of right alone, or, in such a case as the above, a declaration of right and an injunction only.

Held, further, that the only relief sought, independently of this injunction, was such as the Court could not grant with the parties then before it; and that, as the defect could not be remedied without rendering this suit unmanageable, leave to amend ought not to be given.

Quere, whether the above association is legal, and whether a court of equity will recognise a contract of association, which, although morally laudable, is, from the number of persons concerned in it or otherwise, of such a nature as not to enable any of the established judicatures of the realm to deal with it beneficially, or whether such associations must not be left to regulate themselves by a moral rule, without judicial interference.

THE bill in this suit was filed by Elijah Clough, and four other persons, being members of the Loyal Highland Laddie Lodge of the Independent Order of Odd Fellows of the Manchester Unity, on behalf of themselves and all other the members of the same lodge, except the defendants and such members of the said lodge as concurred with such defendants in the matters in the bill mentioned, against William Ratcliffe and other persons, being respectively officers of the Unity of the district and of the lodge, praying for a declaration that the exclusion of the plaintiffs from the lodge was illegal, and for an injunction to restrain the defendants with respect to the application of a sum in their hands belonging to the lodge.

To this bill the defendants demurred for want of equity, and for want of parties.

By the statements in the bill, certain persons were alleged to have attended meetings of the lodge as members, but were not made parties to the suit.

Mr. Rolt and Mr. Roundell Palmer argued in support of the demurrer.

Mr. Russell and Mr. Hargrave, for the plaintiffs.

The *Vice-Chancellor* said, that, having regard to the particular allegations of the bill, it was demurrable, at least for want of parties, if not otherwise. His Honor gave leave to amend.

The bill was accordingly amended, and the statements then were to the following effect:—

That for above a century many thousand voluntary associations called Free Masons' and Odd Fellows' Lodges, and by other similar designations, had existed in Great Britain, consisting of prudent and benevolently disposed persons, chiefly of the lower orders of society, who have associated themselves together in distinct associations for the purpose of raising and maintaining by their own subscriptions separate permanent joint-stock funds, to be applied in defraying the medical expenses of their own sickness, and in affording temporary maintenance to their own families during sickness, also in paying the funeral expenses of deceased members of such associations, and contributing towards the maintenance of their widows and orphans: that, for better accomplishing the purposes aforesaid, all the members of such associations, who were resident near and intimately acquainted with each other, met together at weekly and other regular intervals to pay their several subscriptions towards the funds for the relief of sickness as aforesaid, and to receive applications for relief out of the said funds, and to inquire into and decide upon the expenditure thereof upon the purposes aforesaid: that the amount of the subscriptions to the said sick fund was wholly and exclusively regulated by such lodges separately, as well as the amounts to be allowed for the purposes of relieving the sick members; and that the said subscriptions, which generally averaged about 1*s.* per fortnight, but were liable to be increased or diminished according to the claims upon the said funds, were regularly paid by the members of every lodge to treasurers appointed by the

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members of such lodges respectively for that purpose, and that such subscriptions were usually invested in savings banks and other banks in the names of trustees, members of such lodges respectively, who held such funds upon trust for the purposes aforesaid, and for no other purposes whatever: that, for many years past, the plaintiffs had been and were still members of one of the aforesaid associations, which was called "The Highland Laddie Lodge of the Independent Order of Odd Fellows," and that the plaintiffs, as members of such Lodge, had duly and regularly paid and contributed various sums of money, amounting to several hundred pounds in the whole, towards the raising and maintaining a joint stock permanent fund, to be applied in the manner and upon the purposes aforesaid; and that the said Lodge was in manner thereafter mentioned associated with twenty-three other similar lodges, situated in and in the vicinity of Salford, in order more effectually to mutually assist each other in the accomplishment of the purposes aforesaid: that the rules of the said Highland Laddie Lodge had been printed and circulated, and had been always received and acted upon by the members of the said Lodge, as governing the said association, and as containing the terms and conditions upon which subscriptions were received to the aforesaid funds respectively, and new members were to be admitted to become members of the said lodge: that such rules had for several years past fixed the amount of subscription to the aforesaid fund at 10*d.* per fortnight from each member of the said lodge, which sum had been found sufficient to meet the necessities of the sick members of the said lodge: that the said rules and regulations also provided for auditing the accounts of the said fund, the due attendance of the officers of the said Lodge in order to conduct the inquiry into the sickness of the members, the appointment of surgeons, the visiting of the sick members, the amount of money to be paid in sick gifts, the

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forfeiture by or the suspension thereof during the misconduct of such sick members, the collection and investment of the said subscriptions, and the appointment of trustees to hold such funds upon trust for the purposes aforesaid; and that all and every the matters aforesaid were solely and exclusively under the control of the members of the said Lodge: that the plaintiffs and all other the persons on whose behalf the plaintiffs were suing, had severally and respectively duly and regularly paid all subscriptions due to the lodge fund, or required by the rules and regulations of the said association, and in all other respects had acted in accordance with and duly conformed to and obeyed the aforesaid rules and regulations, and all other rules and regulations governing and regulating, or understood to govern or regulate the said association or the members thereof: that, besides other monies which had been expended by the defendants or some of them, since the plaintiffs' exclusion from the Lodge as thereafter mentioned, there was, at the time of such exclusion, and was still, a sum of 148*l.* 3*s.* 4*d.*, composed in part of the plaintiffs' subscriptions to the fund of the said Loyal Highland Laddie Lodge, and which sum of 148*l.* 3*s.* 4*d.* was then standing in the names of two of the defendants, in the books of the trustees of the Manchester and Salford Savings Bank: that the rules of the said Highland Laddie Lodge had not been enrolled under the provisions of the Friendly Societies' Acts: that once in every year deputies appointed by the members of the said lodges had been in the habit of meeting together for the purpose of reconsidering the various rules and regulations of the said associations respectively, with a view to the improvement thereof, and of recommending to the lodges such alterations: that in the year 1843, William Ratcliffe, a defendant, and the corresponding secretary of the said association, acting in concert with the defendants, and many others of the said members, whose names were unknown to the plaintiffs, formed the design of diverting all the aforesaid lodge-

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funds from the purposes to which they had been originally subscribed, and of appropriating them to his or their own or to other purposes, not being such as the purposes towards which they had been subscribed; and in order the more easily to accomplish such design, the said defendants required the treasurer and other officers of the said lodges to furnish statements of the financial condition of the said lodges, and in particular to return full and exact particulars of all monies held by them upon trust for the purposes aforesaid, or any of them; and in particular the said defendants, without any lawful order or authority from the said annual meeting, required each of the said treasurers to make out and send such statements and returns to him, the said defendant, William Ratcliffe, on or before the beginning of the year 1845: that, on receiving the said notices, the various members of the said lodges took the same into their consideration, and finding nothing in the rules and regulations of the said associations in the smallest degree authorizing or justifying such notices, or compelling the officers of the said lodges to make out or send such statements or returns, many of the said associations refused or declined to comply with such notices: that, out of the twenty-three lodges comprising the said Salford district, ten refused to comply therewith: that many others of the said lodges, among which was the said Loyal Highland Laddie Lodge, not being then so suspicious of the interference of the said last-named defendants, with regard to their said lodge-funds, made and sent the aforesaid statements and returns, in accordance with the said notices: that, in or about the beginning of the year 1845, the said defendant, William Ratcliffe, and all other the defendants thereto, finding that many of the said lodges had refused to furnish the aforesaid statements and returns, and that they would, consequently, at the ensuing annual meeting, which would then take place at Glasgow in the month of May, 1845, be embarrassed and thwarted in their aforesaid design, endeavoured to accomplish such design by combining toge-

ther with such of the members of the said association as in their several lodges had not opposed the making and sending of such statements and returns, and by means of the influence of such combinations, and otherwise, sought and endeavoured to exclude all such of the members of the said lodges as had opposed the making and sending of the aforesaid returns, from all benefits arising from the said lodges and district funds, or either of them: that, on or about the 27th of January, 1845, the usual meeting of the said Loyal Highland Laddie Lodge was held, at which the plaintiffs and the other members of the said Lodge were present, and the plaintiffs were then informed that it was the request of the defendant, William Ratcliffe, that one of the plaintiffs, the secretary of the Lodge, and one of the trustees of the said Salford district, in whose name the district fund, amounting to 259*l.* 19*s.* 6*d.*, was then standing, should be expelled from the Lodge, and excluded from the benefits thereof: that the plaintiffs and the other members refused to comply with such request: that at the subsequent meeting of the said Lodge, held on the 10th of February, 1845, the same subject was again considered by the members of the said Lodge, and it was again decided that such request should not be complied with: that the annual meeting of the members elected by the different lodges had been until recently in the habit of hearing and deciding any dispute or difference as to exclusion from the said associations, in the event of any such dispute arising in any particular lodge or district, and that the plaintiffs, being very desirous of preserving harmony amongst such the said associations, agreed with the defendants and the other parties of a different opinion from plaintiffs in the matters aforesaid, and were desirous, that the question in dispute should stand over until the next annual meeting, which was held at Bristol in the month of June, 1846; that the said defendant William Ratcliffe threatened that plain-

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tiffs and all other the aforesaid members should, until such meeting, be excluded from the said Lodge, and from the benefits thereof: that, at the said annual meeting held in June, 1846, the plaintiffs and the other members of the Lodge were not, nor was any of them, in any manner heard or allowed to attend the said meeting, but the defendant William Ratcliffe made some *ex-parte* statement to the said annual meeting relating to the above matters, the substance and particulars whereof plaintiffs were unable to discover; however the plaintiffs alleged, that, from the said 1st June, 1845, up to the present time, they and the other persons on whose behalf plaintiffs were suing had been excluded from all benefits of the said Lodge without any trial or hearing whatever, contrary to the rules of the said association, and in fact without any charge or accusation whatever being brought against them or any of them, except as aforesaid.

After several other charges the bill charged that the said lodges and associations were wholly unconnected with political or trading combinations, or religious or sectarian controversies, and that all and every such subjects were completely excluded from their meetings. And the bill also charged, that, besides the raising and maintaining funds for the purposes aforesaid, the said associations had no other object whatever to any degree or in any manner connected with their associating themselves together in lodges as aforesaid, save and except the general promotion among the members thereof of a spirit of loyalty to the Queen of these realms, and the cultivation of brotherly love and friendship towards one another; and as evidence of the legality of such associations, the plaintiffs charged, that, since the disputes aforesaid, many of the said associations having the same rules and regulations as the said Highland Laddie Lodge, had been enrolled under the Friendly Societies Acts.

There was also a charge that the said associations were wholly unconnected with each other in relation to the

said lodge funds, and that they were in fact only connected with each other in having and doing their best to promote one common object by the raising of such funds for one and the same purpose; and that although the members of the said lodges annually elected certain officers to attend as aforesaid an annual meeting of similar officers elected by the other associations having the objects aforesaid, yet such officers were elected and met in such annual meeting only for the purpose of preserving harmony among the said associations, and advising and conferring with each other as to the best means of promoting the aforesaid objects of the said associations, and of recommending, on their return from such annual meeting, to the members of the various lodges aforesaid, the adoption of such measures as they agreed to be most desirable towards the purposes aforesaid; nevertheless the plaintiffs charged, that since the transactions and disputes aforesaid, the said annual meeting claimed a right to deal with and control and in some degree to appropriate the lodge funds, and all other funds of the said associations, or any of them, and in particular the said sum of 148*l.* 3*s.* 4*d.*

The bill also charged that no member of such lodges had any right, title, or interest, in the said lodge funds of any lodge, except that whereof he was a member; and that such funds had always been wholly distinct and separate, as well from each other as from all other funds belonging to the said other lodges or districts, or any of them.

The bill further charged, that the members of the Loyal Highland Laddie Lodge were above 100 in number, although a majority of such members, to the number of sixty, had been excluded as aforesaid, and that the number of members of other lodges in the said Salford district claiming an interest in the said sum of money through the aforesaid district committee was upwards of one thousand, and that two of the defendants properly represented all the lodges in the said Salford district in relation to the

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matters in the bill mentioned: that all the members of the said lodges associated together as aforesaid were upwards of 300,000 in number, but that certain other defendants properly represented all other the members aforesaid in relation to the matters in the bill mentioned.

The prayer was for a declaration that the exclusion of plaintiffs and the other persons on whose behalf plaintiffs sued, was illegal and void; and that the plaintiffs, and such other persons respectively, were now, of right, entitled to the benefit of the aforesaid association, and of the said sum of 148*l.* 3*s.* 4*d.*, according to the terms and subject to the conditions existing in the said society before plaintiffs and such other persons respectively were excluded; and that the said defendants might be severally restrained by injunction from applying the said sum of 148*l.* 3*s.* 4*d.*, or any part thereof, to or for any purposes except the relief of plaintiffs and the other members of the Highland Laddie Lodge, according to the rules and regulations thereof, and also from all acts in any manner interfering with the enjoyment of the aforesaid rights of plaintiffs and the other members aforesaid, and from in any manner disturbing or interfering with such rights; and, if necessary, that an account might be taken of the property and funds of the said Lodge, and that the rights and interests of plaintiffs and all other persons therein may be ascertained and declared; and that all necessary directions might be given for giving full effect to such rights and interests, either in manner aforesaid or by repayment to the plaintiffs of the amount in which they should be found to be respectively interested in the said property and funds; and concluded with praying an injunction, and for a receiver and general relief.

To this bill the defendants demurred generally, for want of equity.

May 4th.

Mr. Rolt and Mr. Roundell Palmer, in support of the demurrer.—The present demurrer is merely a demurrer for

want of equity. The bill states the existence of a particular lodge and of a general society of lodges, and that the societies correspond one with the other. Now, such a society is illegal under the provisions of the act 39 Geo. 3, c. 76, s. 2, which declares that certain societies in that act named, "and every society composed of different divisions or different parts, acting separately from each other, or of which any part shall have a separate and distinct president," &c., "or other officer, appointed by or for such part, or to act as an officer for such part, shall be deemed unlawful combinations and confederacies;" and any member acting as such was declared guilty of an unlawful combination or confederacy. The 6th section excepts lodges of freemasons, if registered; and it was not necessary, in order to bring a society within the act, that its object should be treasonable. The stat. 57 Geo. 3, c. 19, s. 25, declared that every society or club that should elect, appoint, nominate, or employ any committee, delegate or delegates, representative or representatives, missionary or missionaries, to meet, confer, or communicate with any other society or club, or with any committee, delegate or delegates, representative or representatives, missionary or missionaries, of such other society or club, or to induce or persuade any person or persons to become members thereof, should be deemed and taken to be unlawful combinations and confederacies within the meaning of the stat. 39 Geo. 3, c. 79; and it authorized prosecutions and proceedings against all members of such clubs, &c. These laws remain in full force, and this society has done nothing to protect itself from the statutory penalties. Even if this society is not illegal, it is impossible for this Court, if it has jurisdiction over it, to carry out such jurisdiction. Here are—first, the particular society or lodge; secondly, the district associations, including the particular lodges; and, thirdly, the general society, including all the district societies by a species of representation. This suit

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cannot be entertained without the Court assuming to interpret the constitution of all the rules of this society. As to the sum of money, the Court cannot deal with it separately. *Pearce v. Piper* (a) was a case of a single society; while this case involves many thousand lodges—each a distinct society essentially connected with other lodges—which are not each represented in this suit. They cited *Collins v. Plumb* (b).

Mr. *Russell* and Mr. *Hargrave*, for the plaintiffs.—This is an association for a charitable purpose, and the Court will give effect to its objects: *Anonymous* (c), *Lloyd v. Loaring* (d), *Osborne v. Williams* (e), *Beaumont v. Meredith* (f). It is not an illegal society; for it is not composed of parts, within the meaning of the statutes cited. The 57 Geo. 3, s. 26, expressly exempts every meeting or society formed or assembled for purposes of a religious or charitable nature only. They also referred to *Ewing v. Osbaldeston* (g) and *Ex parte Norris* (h); and said that, as Lord *Eldon*, in *Pierce v. Piper* (i), altered the rules of a society, so in this case the Court would, if necessary, alter the rules of this society so as to exclude illegality.

The *Vice-Chancellor* referred to *Nash v. Ash* (k).

May 5th. Mr. *Rolt*, in reply.—The Friendly Societies Act confers no privilege, unless in favour of societies enrolled. This society is not a charity. The bill claims private rights arising out of private contracts, and the stock is treated in the bill as being common property. The argument as to

(a) 17 Ves. 1.
 (b) 16 Ves. 454.
 (c) 3 Atk. 277.
 (d) 6 Ves. 773.
 (e) 18 Ves. 379.

(f) 3 Ves. & B. 180.
 (g) 2 Myl. & Cr. 53.
 (h) Jac. 162.
 (i) 17 Ves. 1.
 (k) 1 Eden, 378.

the impossibility of the Court's dealing with this case remains unanswered. There are such a variety of interests, that they cannot be adequately represented, except by a representative for each lodge, which would require at least a thousand parties, and therefore the Court will not interfere. In *Mozley v. Alston* (a), the present *Lord Chancellor* said—"Where the grievance complained of is common to a body of persons too numerous to be all made parties, the Court has permitted one or more of them to sue on behalf of all; subject, however, to this restriction, that the relief which is prayed must be one in which the parties whom the plaintiff professes to represent have all of them an interest identical with his own; for if what is asked may, by possibility, be injurious to any of them, those parties must be made defendants, because each and every of them may have a case to make, adverse to the interests of the parties suing." He also referred to *Taylor v. Salmon* (b) and *Wahworth v. Holt* (c).

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Cur. adv. vult.

The VICE-CHANCELLOR :—

May 25th.

This is a demurrer to an amended bill, filed after a demurrer to the original bill had been allowed with leave to amend generally. The present demurrer was argued in the last term: the only cause for demurring specifically assigned on the record is want of equity.

I wish in the first place to state that I feel some difficulty upon the question, whether the bill is free from the objection upon which Lord *Eldon* proceeded, when he allowed the demurrer in the case of *Lloyd v. Loaring* (d). And it is not, I think, superfluous to add, that I doubt whether the contract of partnership (if that is a proper term) or of

(a) 1 Phill. 799.

(c) Id. 619.

(b) 4 Myl. & Cr. 134.

(d) 6 Ves. 773.

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association for mutual assistance, or however it should be designated, which is the foundation of the suit, is not shewn by the bill to be a contract so circumstanced that the principles and rules of the common law cannot be considered as sanctioning it, and that a court of equity (if not bound by statute to recognise) ought not to recognise it. I do not suggest that abstractedly such a contract, such an association, is otherwise than morally laudable: but if, from the number of persons concerned in it, or for that reason and otherwise, a contract or engagement is of such a nature as not to enable any of the established judicatures of the realm to deal with it beneficially or usefully, or to act upon it efficaciously, without doing injustice, is it the duty of a Court to acknowledge an agreement of that kind?

It may be conceded, that for every civil wrong the law of the country provides or ought to provide a judicial remedy. But is it inconsistent with this concession that the Courts should decline to recognise contracts creating or affecting to create interests and claims of which the powers and means confided by the law to those Courts do not enable them to provide for the regulation, enjoyment, or protection; or that, with reference particularly to cases of the specific sort now before me, the law, among whose oldest institutions is the power of incorporation, with ample means for the government of bodies corporate, and among whose provisions, of later times, that changes in the habits of society have seemed to render expedient, are the statutes relating to friendly societies—that the law, I say, which gives these facilities, should not permit the adoption of every course or every mode of effecting a laudable object, of a nature rather public than merely private, for effecting which it has provided means of particular kinds under wholesome regulations?

I doubt, as I have intimated, whether, upon considerations such as these, the association that this bill brings before the Court, is not without the province of the Court,

and does not fall within the observations of Lord *Eldon* in *Van Sandau v. Moore* (a), unless there is any statute (and certainly I am not satisfied that there is any statute) which ought to be considered as making a material difference in the plaintiffs' favour. I am not sure that the members of an association such as that described, so far as there is a description of it, in this bill, must not, upon civil questions arising out of it, be left (in the words of Lord *Eldon*) to regulate themselves by a "mutual understanding" and by a "moral rule," without judicial interference where Parliament has not assisted them.

An impression, indeed, at once of the moral and civil advantages capable of arising from the societies called "Friendly Societies," and of the inefficacy or insufficiency of the institutions of the country without the aid of Parliament to afford them (unless incorporated) stability and protection, produced, I suppose, the Friendly Societies' Acts, of which the members of the association now before me have not thought fit to avail themselves, though it is probable that it might have been placed under the protection of those acts, and that, if it had, the complaints of the plaintiffs, and those for whom they profess to sue, could, by the means which those acts provide, have been easily, simply, and cheaply redressed.

Without that protection it ought perhaps to be said (in the language of Lord *Eldon* at the end of the case of *Beaumont v. Meredith* (b),) that the objects of such societies as these are of a nature that no court of justice can execute.

It may be suggested that the statutes 33 Geo. 3, c. 54, and 35 Geo. 3, c. 3, recognise the legality of an association such as this, though not having enabled itself to claim the privileges conferred conditionally by the legislature on

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(a) 1 Russ. 462, 470, 471, & 472.

(b) 3 Ves. & B. 180.

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Friendly Societies. The enactments, however, of the statute 33 Geo. 3, c. 54, which does not profess to be a declaratory act, commence with providing "that it shall and may be lawful to and for any number of persons in Great Britain to form themselves into and to establish one or more society or societies of good fellowship, for the purpose of raising from time to time by subscriptions of the several members," and so on; and though I do not forget the preamble of the act, or the provision in the second section, beginning, "nor shall any such society which hath already been established"—I am not, I repeat, convinced that it was the intention of either statute, in the case of any society that should not entitle itself by the means particularly specified to the benefit of the former, to render its affairs cognizable by a court of civil judicature, if, independently of the two acts, they would not have been so cognizable.

But assuming in the present instance the contract, the association, stated by the bill, not to be illegal, assuming it to be one of which the existence is not unfit to be recognised by a court of equity, assuming that the principle of Lord Eldon's decision in *Lloyd v. Loaring* creates no difficulty, the question, we must see, still remains, whether a case is stated by the bill, which, were the cause to go to a hearing upon the bill as it stands, the facts alleged and charged being (without addition, diminution, or variation) proved or admitted, would entitle the plaintiffs to some relief within the range of the relief specifically or generally prayed. If it would not, the demurrer ought to be allowed.

Now, first as to the declarations of right asked. It would not, I apprehend, be consistent with the rules of this jurisdiction to make a decree containing wholly or in part those declarations, and nothing more. Nakedly to declare a right, without doing or directing anything else relating to the right, does not, I conceive, belong to the functions of

this Court. And in a case where a decree containing a declaration of right alone or an injunction alone would not be correct, I suppose that a decree containing a declaration of right and an injunction, but nothing else, would not be correct. When, therefore, in what I am proceeding to say, I shall use the term relief, I wish to be understood as meaning relief beyond a mere declaration of right.

Next, as to the injunction or injunctions asked. The provisional injunction is only as to the sum of 148*l.* 3*s.* 4*d.* The permanent injunction is as to that and more. But so far as it extends to more, it is asked in terms, as I conceive, too general and too vague to be granted; and with regard to the 148*l.* 3*s.* 4*d.*, its amount, when the number, variety, and extent of the interests to which that sum is alleged to be subject are considered, must be thought very slight and trifling.

This, however, is not all: for, conceding or assuming that there may be cases in which an injunction may be proper without any other relief, without a view to other relief, and without the supposition that there is to be other relief, the present, I apprehend, is not one of those cases. I do not conceive that on this record an injunction could be proper without other relief, without any view to other relief, and without the supposition of there being other relief to be granted. What other relief then could be granted on this record, the facts being as, and only as, stated in the present bill?—Beneficially or usefully I apprehend none; for, as I conceive, the Court does not possess the capacity and means of acting efficaciously, so as, avoiding injustice, to do justice for the purposes or any of the purposes for which the bill seeks to bring it into action in the circumstances that the bill states. The prayer beyond the declaration of right and the injunction or injunctions asked is thus:

“And, if necessary, that an account may be taken of the property and funds of said Lodge, and that the rights and interests of plain-

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tiffs and all other persons therein, may be ascertained and declared, and that all necessary directions may be given for giving full effect to such rights and interests, either in manner aforesaid or by repayment to plaintiffs of the amount in which they shall be found to be respectively interested in the said property and funds ; and that in the meantime said defendants, Miles Whitham, Joseph Herald, and Thomas Tindley may be restrained by the order and injunction of this Court from receiving or interfering in any manner with the said sum of 148*l.* 3*s.* 4*d.* or any part thereof, until the further order of this Court, and, if necessary, that a receiver may be appointed of the property and assets of said lodges, and of the payments becoming from time to time due to the same, with proper directions for applying the same in conformity with the rules of said Lodge, and that all proper inquiries may be directed and accounts taken, and directions given for effecting the purposes aforesaid, and for further relief."

The bill must, I think, be understood as denying a dissolution of the society to have taken place, and also, probably, as not seeking a dissolution of it, nor, as I apprehend, in a suit constituted as this is, relating to an association of the description stated on the record, can the Court put an end to the association, or break it up, or change its governing body or bodies, or undertake the regulation or administration of such proceedings or concerns as the proceedings or concerns of such an association must be ; and if all individuals interested were added as parties to the bill, neither would the suit be manageable, whether it is so now or not, nor would the matter be mended.

A bill for relief, not stating facts, upon proof or admission of which, without more, there ought, in the actual state of parties on the bill, to be granted the relief, or part of the relief, specifically prayed, or some relief not inconsistent with that specifically prayed, is demurrable. And that description is, I apprehend, applicable to the present bill.

I allow, therefore, the demurrer, but without costs. Leave to amend has once been given, and I think, in a case at least such as this is, that it would not be right to give leave to amend again.

I may add, that though I think a conclusion against the

bill warranted by principle and authority, and (if I may speak of myself) not at variance with any decision that I have had occasion to pronounce in any other cause, it is a conclusion at which I have arrived not without hesitation, and of which I am not confident of the correctness; neither am I sure that I ought to have given the leave which I did give to amend, or that I went, upon the occasion of disposing of the former demurrer, so fully into the case as I ought to have done. If I was in error in that instance, or am in the present, the mischief, I hope, cannot be considerable. The case, as it now stands at least, is perhaps in principle one of some importance, although the bill does not in my view of it render necessary a decision whether the association in question is one, if not unlawful by the common law, rendered criminal or unlawful by statute, a point strongly argued for the defendants, upon which, if I have formed, I decline stating any opinion; nor do I decide whether the absence of the Attorney-General from this record is material or immaterial, correct in form or substance or incorrect.

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March 18th.

MONDAY v. GUYER.

When there are two defendants who have exactly the same defence, the 6 & 7 Vict. c. 85 does not render the evidence of one admissible in favour of the other.

THIS was a bill for the specific performance of an agreement entered into between the plaintiff and two defendants, named Guyer and Tadd, for the surrender by the defendants to the plaintiff of a term of years vested in the defendants as joint tenants, in consideration of the plaintiff building a house upon the land comprised in the term, and granting a lease of it to the defendants for a term of years, and at a rent in the agreement respectively mentioned. The defendant Tadd was examined in the cause as a witness, on behalf of the other defendant.

Mr. *Bacon* and Mr. *Beales*, for the defendant Guyer, proposed to read this evidence, and referred to the act 6 & 7 Vict. c. 85, providing (among other things) that in courts of equity any defendant in a cause may be examined as a witness on behalf of a co-defendant, saving just exceptions, and that any interest which such defendant may have in the matters in question in the cause shall not be deemed a just exception, but shall only be considered as affecting or tending to affect the credit of the witness.

Mr. *Russell* and Mr. *Piggott*, for the plaintiff, objected to the reception of the evidence, on the ground that the act did not apply to the case of two defendants who had exactly the same defence, and said that no authority could be found for the admission of such evidence.

The VICE-CHANCELLOR said he would not be the first judge to hold that a defendant could be examined as a witness on behalf of another defendant, who had exactly the same interest, and rejected the evidence.

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HILTON v. GIRAUD.

March 26th.

HENRY WRIGHT being entitled to a large personal estate, consisting, among other things, of shares in the London Dock Company, and in the East and West India Dock Company, by his will dated the 11th of December, 1838, (after various specific legacies) gave and bequeathed all the rest and residue of his goods, chattels, personal estate and effects, to the several persons who had been appointed by the Lord High Chancellor of England to be trustees of charitable estates given or to be given for the town of Faversham, and their successors, to be legally appointed for that purpose, upon certain public charitable trusts in the will expressed.

Shares in the London Dock Company and in the East and West India Dock Company, held not to be interests in land within the Statute of Mortmain, 9 Geo. 2, c. 36.

One of the executors and trustees of the will, who was also one of the trustees of the charitable estates of Faversham, filed the present bill for the administration of the testator's estate, making the other executor and trustee, the next of kin of the testator, the remaining trustees of the charitable estates for the town of Faversham, and the Attorney-General, defendants.

On the 19th of March, 1842, an order was made for taking the accounts of the testator's estate, and for the usual inquiries.

The cause now coming on upon further directions, a question arose whether the shares in the London Dock Company and in the East and West India Dock Company, were subject to the Statute of Mortmain or not.

By the act 9 Geo. 4, c. 116, s. 2, the London Dock Company is constituted a corporation, with power to purchase and hold lands, tenements, and hereditaments, to them, their successors and assigns, for the purposes therein mentioned.

By the 9th section, all the docks, basins, wharfs, quays, warehouses, erections, buildings, lands, grounds, tenements,

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hereditaments, and all real and personal property whatsoever, which, under any of the acts therein mentioned, had been purchased or taken or constructed, and which then remained vested in the said company, or in any of the former or then present directors of the said company, were thereby absolutely vested in the said London Dock Company thereby incorporated, to hold to them, their successors, and assigns.

By the 10th section it is enacted, that all the capital or joint stock of the said company theretofore raised and created under any of the provisions of the said recited acts, or which might be raised under the provisions of that act, should be and the same was thereby vested in the said company and their successors, for the purposes of that act, for the use and benefit of the proprietors of the said capital or joint stock of the said company, in the proportions in or to which they were or should be severally entitled thereto, and all and every part of the said capital stock should be deemed to be personal estate, and pass by transfer in the book or books of the said company signed by the proprietor or proprietors thereof, his, her, or their executors or administrators, or his, her, or their attorney thereunto duly authorised, and not otherwise, and should be transmissible and pass by will as such, and in case of no will should be distributable as intestate's personal estate.

The West India Dock Company was constituted under 1 & 2 Will. 4, c. 52; and by 1 Vict. c. 9, the West India Dock Company and the East India Dock Company were consolidated. By the former of the above acts, "An act to consolidate and amend the several acts for making the West India Docks," sect. 4, the West India Dock Company was constituted a corporation, with power to purchase and hold lands, tenements, and hereditaments; and by section 11 the banks, basins, wharfs, quays, warehouses, erections, buildings, lands, and hereditaments, and real and personal property which, before the passing of that act, remained vested in the said company, or in any of its directors or

other persons in trust for the said company, were vested in the said West India Dock Company thereby incorporated, to hold to them, their successors and assigns, for the purposes of the act.

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By section 12 it is enacted, that the capital of the company should be deemed to be personal estate, and pass by transfer in the book or books of the said company signed by the proprietor or proprietors thereof, his, her, or their attorney thereunto duly authorised, and not otherwise.

By 1 Vict. c. 9, s. 2, it is enacted, that, after July 16th, 1838, all the docks, hereditaments, real and personal property of the East India Dock Company should be absolutely vested in the West India Dock Company, to hold to them, their successors and assigns, for such and the same estates, terms, and interests, as should be then existing therein respectively, and for the purpose of that act, and of the above-mentioned act of 1 & 2 Will. 4.

By sect. 6 of the same act, it was enacted, that, from and after the 16th day of July, 1838, the said East India Dock Company should be dissolved, and thereupon it should be lawful for the said West India Dock Company to take and thenceforth use the name of "The East and West India Dock Company" as and for their name of incorporation, and to alter their common seal, and to do all other acts consequent upon such change of name accordingly.

Mr. Koe and Mr. G. M. Crawford for the plaintiff, submitted the question as one between the next of kin of the testator and the Faversham charity trustees.

Mr. Wigram and Mr. Piggott, for the trustees of the Faversham charities.—The only question is, whether these dock shares are hereditaments within the meaning of the Mortmain Act(a). These companies are essentially trading companies, and if they are possessed of lands it is merely for the purposes

(a) 9 Geo. 2, c. 36.

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of the trade. Having regard to the manner in which the interests in the shares are vested in the shareholders, it is submitted, they have not such an interest in any lands as comes within the statute; and the companies' acts constitute the joint stock in which the shareholders have an interest, personal estate in them only. They cited *Attorney-General v. Giles (a)*, *Thompson v. Thompson (b)*, and *Sparling v. Parker (c)*.

Sir *Francis Simpkinson*, and Mr. *Faber*, for the next of kin, submitted that the shares were within the Statute of Mortmain. Although the acts provide that the shares shall be transmissible as personal estate, yet they do not destroy the character of the shares as an interest in land. The old cases went nearly thus far. In *Negus v. Coulter (d)*, the right to lay chains in part of the Thames, to moor ships, was held to be an interest in land within the Statute of Mortmain. They also referred to *Finch v. Squire (e)*. There is no distinction between a corporation being a trustee and an individual being a trustee, and the shareholders have as much interest in the case of a corporation as if the corporation were individual trustees for them. The case of *Thompson v. Thompson (f)*, is distinguishable from the present, inasmuch as there the shares were in a company, the main object of which was the manufacture of gas; here the main profit was the actual use of land, and land covered with water, and warehouses. Moreover, in the London Dock Company Act, the legislature contemplates the landed property as continuing realty in the company, and by sect. 76, authorises the company to sell in case of a dissolution and an agreement to divide the property among the share-

(a) 5 Beav. 433, cited.

(b) 1 Coll. 381.

(c) 16 Law J., N. S., Ch. 57.

(d) Amb. 367.

(e) 10 Ves. 43.

(f) 1 Coll. 381.

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holders. Could it then be said, that the shareholders had not an interest in lands? This is as much a profit from land, as if a company of market gardeners were formed, and they purchased and cultivated land for their trade; whilst the case of *Thompson v. Thompson* was the case only of profit derived from trade in the manufacture of gas.

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Mr. *Kenyon Parker* and Mr. *Greene*, for the defendant, the other trustee and executor of the testator's will.

Mr. *Wray*, for the *Attorney-General*.

The VICE-CHANCELLOR.—A trade can hardly be carried on without some interest in land. Even a merchant must rent or own a counting-house or the room in which he carries on his business. The business of these companies consists in taking care of goods and ships. My opinion is, that stock in these corporations is not an estate in hereditaments corporeal or incorporeal within the meaning of those expressions in the statute (*a*).

(*a*) 9 Geo. 2, c. 36.

1847.

*March 29th
& 30th.*

A testator gave several annuities to four unmarried nieces, a married niece, and a nephew, with a proviso for ceasing on alienation; the testator declaring his intention to be, that the annuities should be received as some provision towards the maintenance of the annuitants during their lives, and that the annuity of the married niece should be for her sole and separate use:—*Held*, that the annuity of an unmarried niece was not limited so as to exclude the marital right of a husband with whom she subsequently married.

A husband, shortly after his marriage, ceased to cohabit with his wife, and never provided her with a home, or contributed to her support; but left her to be supported by her sisters; whilst he re-

GILCHRIST v. CATOR.

JAMES ANDERSON, by his will, dated the 21st of April, 1841, gave unto his nieces, Mary Livingston Callander, Frances Callander, Jane Callander, Harriet Angelina Callander, and Caroline the wife of Frederick Thompson, and also to his nephew, Alexander Bruce, an annuity or clear yearly sum of £50 each, payable half-yearly, during their respective natural lives. And the testator directed that the said several annuitants, or any or either of them, should not have the power to sell, dispose of, transfer, charge, or otherwise incumber, part with, or anticipate the said annuities given to them respectively, or any part thereof; and that upon any transfer, sale, disposition, charge, incumbrance, or alienation being made by any or either of the annuitants of all or any part of the said annuities so given to them respectively, as therein and hereinbefore mentioned, the annuity so transferred, charged, sold, disposed of, alienated, or otherwise incumbered or anticipated, should thenceforth wholly cease to be payable to the said annuitant, or his or her assigns, and should thereupon and thereafter be paid and applied unto and equally divided between his residuary legatees thereafter named, it being the testator's intention that the said annuities should be taken and accepted and continued to be received as some provision towards the maintenance and support of the several annuitants during their respective lives. And the testator declared that the annuity given to Mrs. Thompson should be for her sole and separate use, independently of her then present or any future husband.

The testator died on the 17th of January, 1842, and on the 13th of August following Miss Mary Livingston Cal-

ceived and appropriated to himself her income, and threatened her, by gestures as well as words, with personal violence. In a suit instituted by the wife against her husband and the trustees of an annuity of £50 (which appeared to be all her income), the Court directed the annuity to be paid to her, for her support, till further order.

lander married James Peddin Gilchrist, one of the defendants. She then lived in London, in apartments with two of her unmarried sisters; and to these apartments she returned with her husband on the 20th of August.

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On the 27th of August, Gilchrist having been absent all day, said to his wife on his return, "Mary, I sleep out to-night; at what hour do you dine to-morrow?" Mrs. Gilchrist said he could not mean that; on which Mr. Gilchrist said, "I am quite serious, I sleep out; at what time do you dine to-morrow?" To which Mrs. Gilchrist replied, "Where you sleep you had better dine." He then left the house, taking his portmanteau with him, and never afterwards cohabited with Mrs. Gilchrist.

He came to the house on the two following days, and not being admitted to see Mrs. Gilchrist, conducted himself violently. On the third day after he left the house, Mrs. Gilchrist went into the country, to avoid meeting him; and he was unable to obtain her address till the 12th of September, when it was communicated to him by her solicitor. He then wrote to his wife, proposing a reconciliation; to which the wife, by letter, assented, and Mr. Gilchrist arranged to receive her in London.

On her coming to town, he met her at the coach-office, but had not provided a home or lodging for her.

From September, 1842, till March, 1843, they did not meet.

It appeared that Mr. Gilchrist was an officer on half-pay, having about £75 a-year, and apparently no other property; that Mrs. Gilchrist had £150 invested on mortgage security, and the above annuity of £50 a-year, and no more.

On the 23rd of January, 1844, Mr. and Mrs. Gilchrist met by appointment at the office of Mrs. Gilchrist's solicitor, who paid the 55*l.* 9*s.* 8*d.* to her, as the full balance of the £150 then due, and she immediately handed the money over to her husband. This money was paid to him upon a

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previous promise by him to take his wife to France, that they might live cheaply there.

When the money was paid to him, his wife pressed him to state whether he had taken any lodging for their residence. He replied that he had not, and did not intend to take any, and that she had better return from whence she came; and after making some angry observations, he said, that if she dared to question him as to his going out or coming in, he would horsewhip her as long as he could stand over her, and at the same time flourished a stick over his head in a threatening manner towards her, and expressed his resolution to be, never to live with her again. He then quitted the office.

On the 29th of May, 1844, Mrs. Gilchrist filed the present bill against the trustees and executors under Mr. Anderson's will and Mr. Gilchrist, praying for a declaration that she was entitled to receive the annuity for her sole and separate use, and that the trustees might be directed to pay it to her for the future, that a sufficient sum might be set apart to answer the growing payments, and for an injunction against payment to her husband.

Mr. *Russell* and Mr. *Miller*, for the plaintiff, contended, that, upon the whole will, it was apparent that the testator intended that the annuities of his nieces should be applied to their separate use; and that the declaration that the annuities were to be applied towards their maintenance, was a sufficient manifestation of this intention. They cited *Darley v. Darley* (a), *Dixon v. Olmius* (b), and *Lee v. Prideaux* (c).

The VICE-CHANCELLOR said, it was unnecessary to determine what construction those words might have received if there had not been a man among the annuitants, or if there were not in the will another gift to a niece, technically framed

(a) 3 Atk. 390.

(b) 2 Cox, 414.

(c) 3 B. C. C. 381.

as to exclude the marital right. These two circumstances seemed to decide the question against the construction contended for.

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Mr. *Russell* and Mr. *Miller* then contended, that the whole property ought to be settled on the wife, the husband having abandoned her and threatened her with personal violence. They referred to *Oxenden v. Oxenden* (a), *Nichols v. Danvers* (b), *Williams v. Callow* (c), *Sleech v. Thornington* (d), *Bond v. Simmonds* (e), *Wright v. Morley* (f), and *Elliott v. Ardell* (g).

Mr. *Parker*, for the husband, said, that no case of desertion or cruelty, on the part of the husband, had been made out, and that much stronger circumstances were requisite, to entitle a wife to a settlement of the whole of her property on herself.

Mr. *Lewin* appeared for the trustees.

The VICE-CHANCELLOR.—The husband's conduct is neither justifiable nor excusable. Considering the amount of the annuity, I think the wife entitled to the whole for her separate use. The costs of the plaintiff and the trustees, as between solicitor and client, must be paid out of the arrears, and the trustees must pay the annuity to the plaintiff's separate use till further order. The husband may hereafter entitle himself to apply to have the order varied.

(a) 2 Vern. 493.

(b) 2 Ves. 671.

(c) 2 Vern. 752.

(d) 2 Ves. sen. 562,

(e) 3 Atk. 20.

(f) 11 Ves. 20.

(g) 5 Mad. 149.

1847.

March 26th
& 27th, and
April 29th.

Shareholders in an incorporated navigation company filed a bill to restrain the committee of management from entering into or carrying into effect an agreement with the trustees of a projected railway company, for amalgamating the two undertakings. On the motion for the injunction, it appeared from the defendants' affidavits that the corporate seal of the navigation company had been affixed to the agreement with the railway trustees:—
Held, that the railway trustees were necessary parties to the suit; and the motion ordered to stand over, with leave to amend the bill by making them parties.

On the motion being renewed, upon the amended record, the Court refused the injunction; the navigation company and the committee of management undertaking not to apply any further part of the funds of the navigation company, in any manner not authorised by the Navigation Acts, unless under the authority of Parliament, and all the defendants undertaking to consent to the plaintiffs being treated as persons entitled to oppose the railway bill in Parliament.

Quere, whether a cestui que trust can have an injunction to restrain his trustees from assenting to a bill in Parliament.

PARKER v. THE RIVER DUNN NAVIGATION COMPANY.

BY an act of Parliament passed in the 6 Geo. 2, (c. ix.), for amending two former acts, (12 Geo. 1, c. xxxviii., and 13 Geo. 1, c. cxx.), and for better perfecting and maintaining the Navigation of the river Dunn, and uniting the proprietors thereof into one company, it was among other things enacted, that the undertaking of the navigation of the river Dunn from Holmstill in Doncaster, up to the utmost extent of the township or lordship of Finsley westward, and all powers and authorities to scour and cleanse the said river, make locks, dams, cuts, sluices, bridges in, or near, or over the said river or cuts, make paths, build or make wharfs or warehouses, powers to purchase lands or tenements for the purposes aforesaid, and all tolls, tonnage, lock dues, and duties, and powers to take tolls, tonnage, lock dues, or duties for boats, vessels, or merchandise borne upon the said river between Holmstill aforesaid and the most westerly part of the said township of Finsley, and all other powers, privileges, advantages, property, and interest in the said navigation above Holmstill, or the undertaking thereof, and all other things which were in or by the above-mentioned act 12th Geo. 1, c. xxxviii., vested in or given to the master, wardens, searchers, assistants, and commonalty of the Company of Cutlers in Hallamshire, in the county of York, their successors and assigns, and also the undertaking of the navigation of the said river from Holmstill aforesaid down the said river to Wilsickhouse; and all the powers and authorities which in or by the said act

13th Geo. 1, c. xx., were vested in the mayor, aldermen, and burgesses of the borough of Doncaster, and all the stock, dues, tonnage and other duties, interest and property of both the said corporations and each of them, in or to the said navigations above and below Holmstill, except certain duties in the act mentioned, should be and the same were thereby divided into 150 equal parts or shares, which were thereby vested in the several corporations and the several persons thereafter mentioned, and their several and respective successors, heirs, and assigns, in the manner and proportion therein mentioned.

And it was enacted, that the said proprietors of the said one hundred and fifty shares, their several and respective successors, heirs, and assigns, were, from the 24th June, 1733, united into one body, for the better carrying on, making, maintaining, and perfecting of the said navigation, as well above as below Holmstill, according to the rules and orders thereafter expressed, and should for that purpose be one body politic and corporate, by the name of the Company of Proprietors of the Navigation of the River Dunn; and by the same name should have perpetual succession, and should have a common seal, and by that name should and might sue and be sued, and also should and might have power and authority to purchase lands to them and their successors and assigns, for the uses of the said navigation, and should govern themselves and all their proceedings according to the said rules and orders; and that the said company so united should have full power and authority, and they were thereby empowered and authorised, to do all such acts, in order to the making the said river navigable, and to maintain and support the navigation thereof, both above and below Holmstill, as the said two corporations, or either of them, their or either of their successors or assigns, might have done, or were empowered to do, by virtue of the said two former acts, or either of them; and also to purchase lands for the same purposes.

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and in the same manner as the said two corporations, or either of them, were empowered to purchase lands by the said two acts, or by either of them; and to take and receive all such lock dues, tonnage, and other duties, rents, and payments whatsoever, as the said two corporations, or either of them, or either of their successors or assigns, were empowered to do by the said two acts, or by either of them, except the aforesaid duties which the said mayor, aldermen, and burgesses of the borough of Doncaster were empowered to take as aforesaid; and also to execute all the powers given to or vested in the said two corporations, their successors and assigns, and in each of them, by virtue of the said two acts of parliament, or either of them, and in such manner as such two corporations, or either of them, might have executed the same, except in such particulars as were thereby altered.

And it was enacted, that the said company of proprietors of the navigation of the river Dunn should be and they were thereby enabled from time to time for ever thereafter to purchase, take, hold, and enjoy to and for themselves, their successors and assigns, and also to sell, transfer, or assign any share or shares of the said undertaking or undertakings, or of the lands or tenements purchased for the use of the said navigation, and also to purchase lands, tenements, and hereditaments, to them and their successors and assigns, for the use of the said navigation, without incurring any of the penalties or forfeitures of the Statute of Mortmain, and that any person or persons might give, grant, bargain, sell, and convey, any share or shares of the said undertaking, or any lands, tenements, or hereditaments, to the said company of proprietors, for the use or benefit of the said navigation, without license or alienation in mortmain.

And it was enacted, that the corporation and corporations, person or persons, their successors, heirs, or assigns, who for the time being should have one or more of the said

150th share or shares of the said navigation, or the undertaking thereof, thereby so limited as aforesaid, should have so many 150th shares or parts of the clear profits of said navigation above and below Holmstill, (the same being into 150 shares to be equally divided), as he, she, or they should have such share or shares of said 150 shares of or in said undertaking.

And it was enacted, that certain rules and orders therein set forth should be and the same were thereby declared to be the rules and orders by which the company of proprietors of the navigation of the river Dunn, and all the members of the said company should be governed; and among other such rules it was declared, that there should be a general assembly of the proprietors of the said partnership at the Cutlers' Hall in Sheffield aforesaid, or at the Guildhall in Doncaster aforesaid, upon the second Thursday in August which should be in the year 1734, and so on every second Thursday in August in every year, from and after the said second Thursday, 1734, in the same manner as aforesaid, at two of the clock in the afternoon on every of the said days, to choose a new committee and treasurer, to continue for one year, and to take the accounts of the old one; and it was further declared, that said committee, or any five of them, should be intrusted with, and should have full powers to govern, direct, and manage the said undertaking, as well as buying and purchasing lands, liberties, and materials for the use of the said navigation, as in employing, ordering and directing the work and workmen, and in placing and displacing under-officers, servants, and agents, and in making all contracts and bargains touching the said undertaking, and in raising or falling the lock dues payable to the said proprietors, so as they should judge it to be most convenient and most to the advantage of the said proprietors and the trade of the said river, so that no such purchase or bargain be made without the concurrence of five, at least, of the said committee together assembled; and that the said

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lock dues should not be raised or fallen without the consent of eight of the committee together assembled, or raised higher than they were settled by the said two acts.

By several other acts of Parliament, the portions of the river over which the powers of the company were to be exercised, were extended.

The bill was filed against the company, and against the members of the committee of management, by Thomas James Parker, and Ann Catherine his wife, and their trustee, claiming to be legal owners of one 150th share in the company; and, after setting forth the above act of Parliament, it stated, that several of the shareholders in the company, some of whom were members of the committee of management, had formed a design of departing from the provisions of the said several acts of Parliament, and of injuring and ultimately discontinuing the navigation by the same acts authorised and directed to be carried on; and that the defendants threatened and intended, in the name and on behalf of the company, to enter into and carry into effect an agreement with certain persons, the promoters of an undertaking called The South Yorkshire, Doncaster, and Goole Railway, for the purpose of alienating and disposing of or amalgamating the said navigation, and the tolls, lands, and hereditaments thereunto belonging, in a manner not authorised by the said several acts of Parliament, or any of them, and for applying the monies and other property of the said company in the purchase of or in exchange for shares in the said proposed railway, and otherwise in contravention of the provisions of the said several acts of Parliament, and to the manifest injury of plaintiffs and of the general shareholders in the said company; and that the plaintiffs and several other holders of shares and parts of shares in the company disapproved of and refused to concur in any such agreement, and had expressed such their disapproval to the committee of management, and had explained to such com-

mittee (as the fact was) that no such agreement ought to be entered into or carried into effect.

The bill further stated, that, in the month of October, 1846, a printed circular, bearing the names of five of the committee of management of the company, and bearing date the 16th October, 1846, was sent by post to and delivered to the plaintiff, Thomas James Parker, to the purport following:

“River Dunn Navigation.

“We the undersigned, being five of the committee of the company of proprietors of the navigation of the river Dunn, do hereby give notice that a special general meeting or assembly of the company of proprietors of the navigation of the river Dunn will be held at the Cutlers’ Hall, in Sheffield, in the county of York, on Tuesday the 2nd day of November next, at 12 o’clock at noon, for the purpose of taking into consideration an alteration in the terms of amalgamating this company with the South York Railway.”

That, in December, 1846, six of the defendants entered into a covenant, in their own names respectively, with the trustees of the said proposed railway, and agreed to subscribe £4000 for 2000 shares in the said proposed railway allotted to them.

That, at the time of entering into such agreement, the six last-mentioned defendants were shareholders in the navigation company and members of the committee of management, and had paid to the trustees of the railway company £4000 out of the funds of the navigation company as a deposit.

The prayer was, that the company of proprietors of the navigation of the river Dunn, and the six last-mentioned defendants might be restrained by injunction from entering into or carrying into effect any agreement for the purpose of selling or disposing of, discontinuing or injuring, the

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said navigation, or putting an end to or impairing the rights of the plaintiffs in the said company, or of doing any act for amalgamating the said navigation with the said intended railway company; and might, in like manner, be restrained from applying the funds or property of the said navigation company, or any part thereof, in the purchase of or in exchange for shares in the said proposed railway, or otherwise in a manner repugnant to the subsisting provisions of the said several acts of Parliament, or the purposes for which the said company was established, and from using and permitting to be used the seal or name of the said company for any other than such purposes.

A motion was now made on behalf of the plaintiffs for an injunction, in the terms of the prayer.

In support of the motion, affidavits were read verifying the statements in the bill.

The substance of the material affidavits in opposition to the motion was as follows:—

That, in the year 1845, several bills were promoted in Parliament by the Midland Railway Company for powers to make a railway from Swinton to the town of Doncaster, nearly parallel to the said navigation, and other railways to the Elsecar and Wasbrough, nearly parallel to the canals tributary to the said navigation; and that, in the same year 1845, another bill was promoted in Parliament for making a railway from Doncaster to Goole, also nearly parallel with the said Dunn navigation from Doncaster to Goole, so that, by means of the existing Midland Railway and the projected schemes, railways would have been formed nearly parallel to the said Dunn navigation through the whole length thereof: and that, in case any such railways had been made, the same would have greatly interfered with the traffic of the said navigation and the profits arising therefrom; and, consequently, the said River Dunn Company, under the sanction of general meetings, opposed

such applications, and incurred very heavy expenses in so doing; and all the said bills were in that session of Parliament postponed or thrown out.

That, after the close of the session of 1845, the committee of the River Dunn Company had reason to believe that it was the intention of the Midland Railway Company to renew the application to Parliament in the ensuing session, and finding, also, that some other companies were formed, promoting railways within the district traversed by the Dunn Navigation, and which would be in direct competition with the said navigation, and deeming it impracticable to prevent the construction of some such railways, judged it to be greatly for the benefit of the said company of proprietors that the said navigation should be amalgamated with a railway adapted for the accommodation of the districts, and that the navigation and railway should mutually co-operate, rather than the said navigation be subjected to the obstruction and rivalry of a hostile railway.

That, with this view, the committee of the navigation company entered into negotiations with the principal coal-owners and land-owners in the district, and also with the other promoters of a railway, called "The South Yorkshire Coal Railway," which was adapted for the accommodation of the district traversed by the said Dunn Navigation, and by the Dearne and Dove canal, and by a portion of the Barnsley canal, which are tributary to the said river Dunn. And it was agreed, that, provided Parliament should sanction such arrangements, such Dunn company and navigation should, by the act to be obtained for constituting said railway company, be amalgamated with the said projected railway; that the present dividend of £120 per share on the 150 shares in the navigation of the said river Dunn should be guaranteed by the said railway company to the said navigation proprietors, with the option to such proprietors to convert such dividend into railway stock, at the rate of

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twenty-five years' purchase, and with the option, on the part of the railway company, at any time before such conversion, to buy out the same dividend at the rate of twenty-five years' purchase.

That the application was made to Parliament, in the last session, for an act to carry out the agreement before referred to; but the bill was thrown out by the committee to whom the same was referred.

That, throughout such session, in consequence of the said agreement, the said railway company took upon itself the trouble and expense of opposing all other railways within the district of, and which competed with, the said river Dunn Navigation.

That, had the said navigation committee been called upon to oppose the said railways in Parliament at their own cost, the expense of such opposition to the said navigation company would have exceeded £5,000, and such opposition would have been absolutely necessary, in order to protect the interests of the said navigation company, had not such agreement as aforesaid been made.

That, at the general annual meeting of the navigation company, held on the 6th day of August, 1846, at which the plaintiff Thomas James Parker was present, it was resolved that the committee then appointed be authorised to carry out any arrangements already entered into, with reference to the South Yorkshire or any other railways, as also to enter into such other arrangements, as in the discretion of the committee might be considered desirable or necessary, for the protection of the interests of the River Dunn Navigation.

That, at a meeting of the committee of the said company of proprietors, held on 21st December last, the seal of the company was affixed to the counterpart of an agreement of that date, and made between Earl Fitzwilliam, Lord Warncliffe, Frederick William Thomas Vernon Wentworth,

Esq., and William Bennett Martin, Esq., acting on behalf of the South Yorkshire, Doncaster, and Goole Railway Company, and other the companies and corporations whose seals were thereunto affixed, and parties and persons whose names were thereunto subscribed and seals affixed, of the first part, and the company of proprietors of the navigation of the river Dunn, of the other part, whereby, after reciting that the parties thereto of the first part, and others, were minded and desirous of forming and making a railway, to be called the South Yorkshire, Doncaster, and Goole Railway, connecting the Silkstone, Elsecar, Wasborough, and Barnsley coal-fields, in the county of York, with the Great Northern, the Sheffield and Manchester, the Huddersfield and Sheffield, and the Midland Railways, for the objects and purposes, and upon the principle set forth in the subscribers' agreement, entered into previous to the then last session of Parliament, for making the same, and to constitute such independent termini, and for forming such junction or junctions with any other railway or railways already existing or projected, or which might be thereafter formed or projected, and with such branch railways and extensions of the main or branch lines, as the committee of management or directors of said South Yorkshire, Doncaster, and Goole Railway, should, in their discretion, deem most expedient. And, after reciting that such projected railway would interfere with the River Dunn Navigation, and the Dearne and Dove Canal, respectively; and that it would conduce to the more cheap and expeditious transit of the minerals from the South Yorkshire district, and would be mutually advantageous to the said parties thereto, that the properties and interests of the said River Dunn navigation, and of the said Dearne and Dove Canal respectively, should be amalgamated with the proposed railway, upon the terms and conditions, and subject to the agreements and stipulations thereafter set forth, it was

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witnessed, that the parties thereto of the first part, on behalf of the said South Yorkshire, Doncaster, and Goole Railway Company, but not so as to render themselves individually liable, thereby covenanted with the company of proprietors of the navigation of the river Dunn, their successors and assigns, that the said covenanting parties should give the regular notice of application to Parliament, for leave to bring in a bill, and to obtain an act, to make a railway or railways to connect the Silkstone, Elsecar, Wasborough, and Barnsley coal-fields, with the Great Northern, the Sheffield and Manchester, the Huddersfield and Sheffield, and the Midland Railways, and to effect all other the objects, purposes, and intentions thereinbefore mentioned, and would take or cause to be taken all such other steps and means in the then next and any subsequent session or sessions, which might be requisite for applying for and obtaining an act of Parliament to carry out such objects and intentions, that, by the act to be so obtained, the said River Dunn Navigation, and the Dearne and Dove Canal respectively, should be amalgamated with the said projected railway, (subject to such alterations, if any, as to the powers and privileges of the said navigation and canal companies respectively as Parliament might require), upon the terms therein specified, being, among others, the following, viz.—

That the capital, property, and effects, of and belonging to the River Dunn Navigation Company, should, on the passing of the act, be considered and taken as converted into £450,000 paid-up capital stock in the amalgamated company; and by the act to be obtained as aforesaid the proprietors of the shares in the said navigation should be duly registered in the books of the amalgamated company, in proportion to their respective shares and interests; which capital stock so to be registered, should, nevertheless, be subject and liable to all such liabilities and responsibilities to

which the respective shares in the River Dunn Navigation were liable and responsible immediately previous to the passing of the proposed act.

That the amalgamated company should be at liberty at any time within ten years after the opening of the proposed railway, to buy up or pay off at par the whole of the said capital stock to be registered in respect of the River Dunn Navigation as aforesaid, on giving twelve months' previous notice of their intention so to do.

That, by the act to be so obtained as aforesaid, the company to be thereby incorporated should be made liable and responsible for all other collateral liabilities and engagements of the said company of proprietors of the navigation of the river Dunn to which the last-mentioned company should be liable at the time of passing the proposed act, to the entire exoneration and discharge of the same River Dunn Company, provided that no more contracts or engagements from the date of that agreement should be entered into, nor any new liabilities or debts incurred without the consent of the provisional committee of the said railway company, otherwise than those which were requisite and necessary for carrying out and perfecting those already entered into.

That the capital stock to be registered in respect of the shares in the River Dunn Navigation should not be subject or liable to any call whatever; nor should the owners or holders thereof, in case of the failure of such application to Parliament as aforesaid, be subject or liable to bear or pay any portion of the expenses attendant on applying for, obtaining, or carrying into effect the proposed act, but that such expenses should be wholly and exclusively borne and paid by the amalgamated company.

And the navigation company for themselves and their successors thereby covenanted with the parties of the first part, their successors, executors, administrators, and assigns, that they the said navigation company, their successors and

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any and all such arrangements or agreements which might be made or entered into for the furtherance of the proceedings of Parliament in carrying out that agreement, so that any resolutions or decisions were approved of in writing by the Parliament at any time for the time being of the River Board of Inquiry, and should bear witness in such other acts, matters, and things as might be requisite and necessary, and for all other things which might be requisite to enable the said parties to the said agreement to perform in act or acts of Parliament of the said Acts and purposes aforesaid, and for carrying out the foregoing arrangements, agreements, and stipulations.

The witness in question also stated that it was not intended to apply any part of the funds of the navigation company, beyond the deposit of £4000 paid in January 1841, and which was approved of by a general meeting of proprietors, in aid of the railway company, or in any manner not authorised by the navigation acts, unless or until the same should be authorised by the act to be obtained from the said railway company: and that it was not intended that any act shall be done by the directors, or any of them, or interfere with the property of the said company of proprietors, unless under the authority of some such act of Parliament to be obtained as aforesaid.

Mr. *Kayton Porter* and Mr. *Hamilton Humphreys*, in support of the motion, cited *Coleman v. Eastern Counties Railway Company a*, and *Berradale v. Brickwood (b)*.

The VICE-CHANCELLOR said, he was not aware of the case having occurred in which a cestui que trust had applied for

(a) 16 Law Jour. (Chancery) 73. (b) 1 You. & Coll. 60.

an injunction to restrain his trustee from giving the assent which the rules of the Houses of Parliament required to the passing of a bill. The case of *Ware v. Grand Junction Water works Company* (a), appeared to bear upon the question, and to be in favour of the defendants. But there was here a preliminary objection to the frame of the bill. It sought to restrain a trustee from entering into or carrying into effect an agreement alleged to be a breach of trust. Now, it appeared that the agreement was actually executed, and that the parties with whom it was made were not before the Court. If the execution of that agreement amounted to a breach of trust, those parties had notice of that circumstance, and participated in the breach. Could the Court prevent the performance of the contract, without having all the parties before it, and leave the present defendants to be sued at law for not fulfilling their contract?

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Mr. *Kenyon Parker* and Mr. *H. Humphreys*, said, that the suit had been so framed, on account of the fact of the agreement being actually executed not having been known to the plaintiffs till it was disclosed by the affidavits now filed. It was not, however, necessary to make the railway trustees parties, it being in the option of a cestui que trust to proceed against the trustees alone if he thought fit; and the latter could not be heard to allege as an objection, that the breach of trust of which they had been guilty would subject them also to proceedings at the suit of strangers, for improperly entering into a contract which they had no authority to carry into effect.

The VICE-CHANCELLOR said, that all that could be done at present was, to give the plaintiffs leave to amend the bill, without prejudice to the motion, and to allow the

(a) 2 Russ. & Myl. 470.

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motion to stand over, on the defendants undertaking not to apply any further part of the funds of the navigation company in any manner not authorised by its acts of Parliament, such undertaking to be without prejudice to any question in the cause.

April 29th.

The bill was accordingly amended by making the railway trustees defendants, and the motion came on again to be heard on this day.

Mr. *Kenyon Parker* and Mr. *H. Humphreys*, appeared for the plaintiff.

Mr. *Wigram* and Mr. *E. B. Denison*, for the Canal Company.—The motion is disposed of by the case of *Ware v. The Grand Junction Water Works Company (a)*, where the Lord Chancellor said, “All the arguments used here touching the great change to be effected by the new project;—that the change is as great as if, instead of a canal, there was to be an application to convey by steam upon a railroad—that it is likely to ruin the proprietors, and the like,—are still open to the plaintiff before a committee of the House of Commons or House of Lords. There is not a single individual who fancies himself aggrieved by the proceedings, who may not apply in person before that tribunal, and, by his agents, counsel, and witnesses, oppose the passing of the bill into a law. Is not that the old, regular, and constitutional mode? and is not this a new and an irregular mode of proceeding? If this application is listened to, every time a new act of Parliament is applied for by a body consisting, like this water company, of 600 or 700 proprietors, if a single member chooses to differ from the rest (and, indeed, but for that very difference, the intervention of Parliament would,

;(a) 2 Russ. & Myl. 470.

in most cases, be unnecessary), before the corporate seal can be carried to Westminster at the foot of a petition by the company, praying for an extension of its powers, the matter must be first discussed here upon an injunction bill, and if it survives the injunction bill, then, and not till then, will it come to its proper tribunal. I, for one, am not prepared to open this door to litigation." They also cited *Mozley v. Alston* (a), *Attorney-General v. Manchester and Leeds Railway Company* (b), and *Mayor of Lynn v. Pemberton* (c).

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Mr. *De Gez* appeared for the Railway Company.

Mr. *Kenyon Parker*, in reply, distinguished the case from that of *Ware v. Grand Junction Water Works Company*, on the ground that in the latter case the company were applying to Parliament for an act, against which application, possibly, individual members of the company might be heard; whereas, in this case, the Navigation Company were merely assenting parties to the proposed bill, and the plaintiff would not be permitted to contend in Parliament against that assent being given, and would be without remedy unless this Court interposed.

The VICE-CHANCELLOR asked, whether the Navigation Company and the Railway Company would undertake that the plaintiffs should be treated as parties entitled to appear before either House of Parliament for the purpose of opposing the bill?

On the counsel for the Companies agreeing to give this undertaking,

The VICE-CHANCELLOR said, that no fraud had been imputed to the defendants. It was only contended that they

(a) 1 Phill. 790.

(b) 1 Railw. Cas. 436.

(c) 1 Swanst. 244.

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motion to stand over, on the defendants undertaking not to apply any further part of the funds of the navigation company in any manner not authorised by its acts of Parliament, such undertaking to be without prejudice to any question in the cause.

April 29th.

The bill was accordingly amended by making the railway trustees defendants, and the motion came on again to be heard on this day.

Mr. Kenyon Parker and Mr. H. Humphreys, appeared for the plaintiff.

Mr. Wigram and Mr. E. B. Denison, for the Canal Company.—The motion is disposed of by the case of *Warrington v. The Grand Junction Water Works Company* (a), where Lord Chancellor said, "All the arguments used touching the great change to be effected by the new power—that the change is as great as if, instead of a canal, it was to be an application to convey by steam upon a railway—that it is likely to ruin the proprietors, and the bill is still open to the plaintiff before a committee of the House of Commons or House of Lords. There is not a single individual who fancies himself aggrieved by the proceeding, and may not apply in person before that tribunal, and agents, counsel, and witnesses, oppose the passing of the bill into a law. Is not that the old, regular, and common mode? and is not this a new and an irregular mode? If this application is listened to, every act of Parliament is applied for by a body of interested persons. If this water company, of 600 or 700 proprietors, member chooses to differ from the rest (and that very difference, the intervention of Parliament is necessary).

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took a mistaken view of the interests of the Company. Now, it appeared to his Honour that the circumstances appearing on the affidavits rendered it important that some proceeding of an extraordinary character should be taken to protect the interests of the Navigation Company. And considering that the course taken, whether erroneous or not erroneous, had been taken *bona fide*, and that it had not been shewn that the plaintiffs would be without remedy, even supposing the defendants to have committed a breach of trust; considering further, that nothing was intended to be done except under the authority of Parliament, his Honour thought he ought not to interfere, if the defendants gave the undertaking which he was about to mention. His Honour then stated the terms of the order as follows:—

Refuse the motion without prejudice to any question in the cause, and without prejudice to the following undertaking: The Dunn Navigation Company and the Directors of the South Yorkshire Railway Company, undertaking that the plaintiffs shall be treated as parties entitled to appear by counsel or otherwise before either House of Parliament, or before any committee of either House, and oppose the passing of the South Yorkshire Railway Bill.

*July 3rd,
1848, &
March 10th,
1847.*

YOUNGHUSBAND v. GISBORNE.

THIS was the petition of two judgment-creditors of J. W. Astley, (to whom an annuity was bequeathed by the testator in the cause), claiming under a special direction in the decree to have their debts paid out of the annuity. The debts arose under the following circumstances:—

By an indenture of the 10th of March, 1840, J. W. Astley, for valuable consideration, covenanted with one of the petitioners and two other covenantees, who had since died, to pay the covenantees £6000 on March 10th, 1847, unless the covenantor should previously die.

Contemporaneously with this deed, and as part of the same transaction, the covenantor gave the covenantees a warrant of attorney to confess judgment in the sum of £10,000, subject to defeazance if the sum of £6000 should not become payable, or upon payment within three months after it should become payable, and with a declaration that no execution should issue until default should be made in payment of the £6000 if and when it should become payable.

On February 6th, 1841, J. W. Astley, for valuable consideration, covenanted with both the petitioners and another person, since deceased, to pay the covenantees £1500, on February 6th, 1848, unless he should previously die, and at the same time executed a warrant of attorney for securing the £1500, with a defeazance in the event of the sum being paid or becoming not payable.

Judgments were entered up upon both warrants of attorney, and registered.

In May, 1842, J. W. Astley took the benefit of the act 1 & 2 Vict. c. 110.

In 1835, he became entitled to an annuity or rent-charge of £400 per annum, under the will of the testator in the cause, dated the 17th June, 1823, whereby the testator gave

Judgment debt, payable at a future day, and subject to be defeated in the event of the previous death of the debtor, held to be a charge, under the 1 & 2 Vict. c. 110, s. 13, upon an annuity bequeathed to the debtor, and payable out of real estate, but not so as to affect growing payments accruing due before the judgment-debt became payable.

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certain real estates, to trustees, upon trust, to levy and raise yearly during the life of J. W. Astley, and pay to him an annuity or yearly sum of £400.

The present suit was instituted by the assignees under J. W. Astley's insolvency against the parties interested under the will, for the purpose of having the annuity secured to the assignees. The cause was heard on the 7th of August, 1844, when a question arose as to the effect of the will in preventing the annuity from passing to the assignees. The arguments and decision are reported by Mr. Collyer (*a*).

By the decree, the trustees were directed to pay the annuity with the arrears thereof, from the 24th of December, 1842, to the plaintiffs, upon the 10th of November then next, and the subsequently accruing payments thereof as they should become due, until the further order of the Court; the trustees to be at liberty to give notice of the decree to the judgment-creditors of the insolvent, and the decree was declared to be without prejudice to the rights of the several judgment-creditors of the insolvent Astley, to take any proceedings they might be advised, and liberty was given to them to make any application in the suit.

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July 3rd.

Under this decree the petitioners now claimed to be entitled to a charge on the annuity of £400, in priority to the plaintiffs in the suit, to the extent of their judgment-debts. The prayer of the petition was for an order that such sum as upon the taking of the accounts and on the inquiries under the decree should appear to be due in respect of the annuity, as from the 24th December, 1842, might be paid into and secured in court, to answer and satisfy the charges created by the two judgments on the warrants of attorney, and such sums as should become due and payable to the petitioners in respect thereof; or, if the Court should be of opinion that the plaintiff was entitled to the payment of the amount to be found due in respect of such arrears, and the sums due and to become due in respect of the annuity

(*a*) 1 Coll. 401.

before the times when the £6000 and £1500 should respectively become payable, then that it might be ordered, that from and after those times, all payments of the annuity might be paid into Court for the purpose of answering and satisfying the two judgment-debts.

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Mr. *Wigram* and Mr. *Bacon*, for the petitioners, submitted that the annuity of £400 was a rent-charge within 1 & 2 Vict. c. 110, s. 13 (a), and that the judgments, being duly signed and duly registered, constituted equitable present charges thereon, although the executions were not to issue until a future day.

Mr. *Anderdon* and Mr. *Hallett*, for the plaintiffs in the suit, in opposition to the petition :—

Three questions arise on this petition—1st, whether the petitioners have any lien at all ; 2ndly, whether, if they have, it can be made available ; and, 3rdly, whether the 1 & 2 Vict. c. 110 applies to a judgment entered on a contingent debt.

No present equitable charge could exist in respect of a debt on which execution cannot immediately issue. The 13th section of the act must be taken in connection with

(a) The enactments of the 1 & 2 Vict. c. 110, so far as they are applicable to the questions on the above petition, are as follows:—Sect. 11, “ And whereas the existing law is defective in not providing adequate means for enabling judgment-creditors to obtain satisfaction from the property of their debtors, and it is expedient to give judgment-creditors more effectual remedies against the real and personal estate of their debtors than they possess under the existing law : be it therefore further enacted, that it shall be lawful for the sheriff or other officer, to whom any writ of *elegit*, or any precept in pursuance thereof, shall be directed at the suit of any person, upon any judgment, which, at the time appointed for the commencement of this act shall have been recovered, or shall be thereafter recovered in any action in any of her Majesty’s superior courts at Westminster, to make

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the 11th section (a). Before this act, when a party came to this Court as a judgment-creditor for the purpose of having the benefit of his judgment, he must have sued out execution upon the judgment: *Neate v. The Duke of Marlborough* (b).

Mr. *Malins*, for the trustees.

Mr. *Beales*, for J. W. Astley.

The VICE-CHANCELLOR directed that the arrears and future payments of the annuity should be impounded, and that the petition should stand over until the 10th March, 1847,

and deliver execution unto the party in that behalf suing of all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power, which he might, without the assent of any other person, exercise for his own benefit, in like manner as the sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of *elegit* is sued out: which, lands, tenements, rectories, tithes, rents, and hereditaments, by force and virtue of such execution, shall accordingly

be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the court out of which such execution shall have been sued out, as a tenant by *elegit* is now subject to in a court of equity."

Sect. 13. "And be it enacted, That a judgment already entered up, or to be hereafter entered up against any person in any of her Majesty's superior courts at Westminster shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments (including lands and hereditaments of copyhold or customary tenure) of or to which such person shall, at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled, for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy."

(b) 3 My. & Cr. 415.

when the amount secured by the first judgment would become payable.

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Mr. *Wigram* and Mr. *Bacon* now brought on the petition, suggesting that a large balance having on this day become payable to the petitioners upon their first judgment, the petitioners were entitled to the arrears of the annuity, and also to all future payments, until that judgment should be satisfied; and before this could take place, the amount secured by the second judgment would become payable. *March 10th.*

Mr. *Swanston* and Mr. *Hallett*, for the plaintiffs, did not dispute the petitioners' right to the future payments of the annuity, but they again contended that the arrears could not be affected by the judgment-debt.

Mr. *Malins* appeared for the trustees of the will.

Mr. *Wigram*, in reply.

The VICE-CHANCELLOR:—

It would be giving to these petitioners a more extensive charge than they contracted for, if I were to hold that sums payable previously to the time of the debt becoming actually due, were payable to them. Having referred to the act 1 & 2 Vict. c. 110, I think that the payments of the annuity, which previously to this date became due, are not subject to the judgment, but that from this date they are liable.

1867.

March 1868.

HILL v. MASTERS.

In a creditor's suit, the Court has no jurisdiction, under 1 Will. 4, c. 47, or 2 & 3 Vict. c. 60, to extend the sum to be raised by way of mortgage by an infant, for payment of the debts of his ancestor or devisor, so as to include money required for repairs, even where such repairs are necessary in order to obtain an advance on mortgage, and where a mortgage is much more beneficial for the infant than a sale would be.

A TESTATOR, by his will dated 3rd of October, 1832, devised his real estates to one of the defendants, an infant, for life, with Evers remainders over. The testator's personal estate proving insufficient for the payment of his debts, the present suit was instituted by a creditor to have the deficiency raised by sale of the real estate.

By the decree on further directions the Master was directed to raise £800, by sale or mortgage of the real estate, that sum being required, in addition to the money standing to the credit of the cause, to satisfy the testator's debts.

The Master approved of the sum of £800 being raised by a mortgage of the property, which consisted of houses, much out of repair. It was found to be impossible to raise the sum required on mortgage of the property in its present state; but a person had been found who was ready to advance the £800, and £120 in addition, being the sum necessary to put the premises into proper repair, on condition that the additional sum should be included in the mortgage debt. The Master, however, declined to sanction the raising of any further sum beyond the amount directed to be raised by the decree.

This was the petition of the plaintiff in the suit stating the above facts, and praying that the Court would direct the Master to sanction the raising of the £120 in addition to the £800—the £120 to be expended in repairs. It appeared that, unless this were done, the money required could not be raised on mortgage, and that a sale would be much less beneficial for the infant.

Mr. *G. L. Russell*, in support of the petition.—Under the act 1 Will. 4, c. 47, s. 11, the Court has authority in this suit to direct a sale for the satisfaction of the debts of the testator, and to order the infant defendant to convey effectually;

and by 2 & 3 Vict. c. 60, s. 1 (a), the provisions authorising the Court to direct a conveyance, are extended so as to authorise the Court to direct mortgages as well as sales to be made for such purpose. It would seem to be within the scope of the latter act to direct the additional sum to be raised for the purpose of repairs, it being incontestably necessary to raise the £120, in order to raise the £800 on mortgage. He referred to *Garmstone v. Gaunt* (b).

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Mr. *Headlam*, for the infant tenant for life, said—that, if the Court could make the order, it would be beneficial for the infant.

Mr. *Spurrier* appeared for the other defendants, and offered no opposition.

(a) The following are the enactments referred to, 11 Geo. 4 & 1 Will. 4, c. 47, s. 11:—"And be it further enacted, that where any suit has been or shall be instituted in any court of equity for the payment of any debts of any person or persons deceased, to which their heir or heirs, devisee or devisees, may be subject or liable, and such court of equity shall decree the estates liable to such debts or any of them to be sold for satisfaction of such debt or debts; and by reason of the infancy of any such heir or heirs, devisee or devisees, an immediate conveyance thereof cannot, as the law at present stands, be compelled, in every such case such court shall direct, and if necessary compel such infant or infants to convey such estates so to be sold (by all proper assurances in the law) to the purchaser or purchasers thereof, and in such manner as the said Court shall think proper and direct; and every such infant shall make such conveyance ac-

cordingly, and every such conveyance shall be as valid and effectual to all intents and purposes, as if such person or persons being an infant or infants, was or were at the time of executing the same, of the full age of twenty-one years."

2 & 3 Vict. c. 60, s. 1. After reciting the 11 Geo. 4 & 1 Will. 4, c. 47, the act proceeds as follows:—"Be it therefore enacted, that the said hereinbefore recited provisions of the said act shall extend, and the same are hereby extended, to authorise courts of equity to direct mortgages as well as sales to be made of the estates of such infant heirs or devisees, and also of lands, tenements, or hereditaments so devised in settlement as aforesaid, and to authorise such sales and mortgages to be made in cases where such tenant for life, or other person having a limited interest, or such first executory devisee as aforesaid, is an infant."

(b) 1 Coll. 577.

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The VICE-CHANCELLOR held that he had no jurisdiction to extend the sum to be raised by mortgage, for the purpose of paying for repairs, and declined to make the order sought by the petition.



March 26th.

PARKER v. PEET.

In the prosecution of inquiries in the Master's office, the plaintiff brought in a state of facts, and examined under a commission witnesses whose evidence charged the defendants with the receipt of monies, and of whose depositions publication had passed. The defendants then brought in a state of facts admitting the receipts, but discharging the defendants by payments. On motion the Court gave the defendant liberty to issue a commission and examine witnesses in support of the discharge, but not to contradict the plaintiff's state of facts.

BY the decree in this cause, made on the 13th July, 1846, the Court referred it to the Master to make certain inquiries.

Under this decree the plaintiff brought in his state of facts before the Master, and upon the Master's certificate a commission was issued to examine witnesses on behalf of the plaintiff, and witnesses were examined under that commission.

On the 1st February, 1847, the plaintiff obtained on motion, with notice, an order that the depositions of the witnesses be published. Publication accordingly passed.

The depositions charged the defendants with the receipt of certain sums. The defendants then brought in a state of facts, introducing new facts consistent with the plaintiff's state of facts, but discharging the defendants from the sums with which they were charged.

Mr. *Wigram* and Mr. *Wright*, on behalf of the defendants, now moved for liberty to issue a commission for the examination of witnesses in support of their state of facts, not contesting the plaintiff's state of facts, but in the nature of confession and avoidance.

Sir *Francis Simkinson* and Mr. *Daniel*, for the plaintiff, submitted that it was not right, after the plaintiff had established his state of facts by evidence, to allow the defendants to bring in another state of facts, and have an opportunity of presenting their case, with the benefit of knowing all their opponents' evidence. Such a procedure was not admissible

except in a case of surprise, as in *Willan v. Willan* (a), or unless there were special circumstances, for the want of which it was refused in *Winpenny v. Courtenay* (b). No stronger special circumstances were offered in this case than in that. It was also contrary to principle; for the pleadings should be one and entire.

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The VICE-CHANCELLOR:—

It appears consistent with authority and with the practice in the Masters' offices, to give liberty to the defendants, under the circumstances of this case, to examine witnesses for the purpose of proving any allegations in the state of facts which they have taken in, but not for the purpose of contradicting any allegations in the plaintiff's state of facts.

The order was—That the defendants should be at liberty to examine witnesses, for the purpose of proving the facts alleged in their state of facts, but not for the purpose of disproving or contradicting any facts alleged by the plaintiff's state of facts, and that the defendants should be at liberty to sue out a commission for that purpose; and in case the parties entitled to examine witnesses under such commission should not, within four days after notice of that order, agree to the nomination of persons to be commissioners therein, and the order in which such commissioners should be named, it was ordered that it should be referred to the Master to select, or nominate, and certify certain persons to be such commissioners in the manner directed in the 98th, 99th, 100th, and 101st of the orders of the 8th of May, 1845, in the cases therein provided for. Notice to be given in a fortnight. Costs to be costs in the cause.

(a) 19 Ves. 590.

(b) 5 Sim. 554.

1847.

March 27th.

ESDAILE v. MOLYNEUX.

An exception to an answer held to have been properly allowed, although it set out inaccurately the interrogatory, the answer to which was the subject of exception, there being, besides the inaccurate transcript of the interrogatory, a reference to it by its number. *Semble*, that the reference by number alone would be sufficient.

IN this case, which is reported, on the occasion of a former application, in Mr. Collyer's Reports, (vol. ii., p. 636,) the Master had allowed all the exceptions to the answer except three.

The defendant now excepted to the report, and upon the fourth exception to the answer the defendant submitted that it ought to have been overruled, as not setting out correctly any portion of the bill.

The fourth exception was as follows:—

“For that the said defendant hath not in and by his said answer according to the best and utmost of his belief answered the thirteenth interrogatory in the said bill contained (that is to say).”

The exception then purported to set out the interrogatory, but set it out inaccurately, as follows, the words printed in italics not occurring in the record of the bill: “And that the said defendant may discover and set forth to whom and to what person or persons, by name and address, and what quantity or quantities in the whole, and for what price or prices he has sold or delivered splints for matches, or matches *made from splints*, made or manufactured by the said machine, which the said defendant admits to have been used by defendant, and to have been made for him by the said Thomas Riding, and what was the total quantity of such last-mentioned splints and matches made from such splints, sold and delivered by the said defendant since the date of the said letters patent, and what is the total amount of the prices for such splints and matches, and what amount of profits have been made or derived by the said defendant from the sale thereof.”

Mr. Wigram and Mr. Bird were for the defendant.

Mr. *Anderdon* and Mr. *Rogers*, for the plaintiff.

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The VICE-CHANCELLOR:—

My opinion is, that as the exception expressly designates the interrogatory by its number, besides professing to set it out, the inaccuracy relied upon is immaterial. As the practice now prevails of numbering the interrogatories in a bill, exceptions might perhaps be usefully abridged by referring to the number of each interrogatory alleged to be insufficiently answered. Such a practice might possibly save the necessity of setting out the interrogatory itself.

HUNT v. SCOTT.

March 26th &
31st.

THIS was a suit for the appointment of a new trustee of a will, and to obtain the opinion of the Court as to the right of the tenant for life under the trusts of the will, to the enjoyment of the proceeds of the personalty *in specie*.

Richard Benstead, the testator, by his will dated December 1, 1817, gave, devised and bequeathed unto Thomas Scott and Titus Wood, and the survivor of them, his heirs, executors, administrators, and assigns, all monies in the testator's house and monies due to him, and securities for money of every kind, and all other his personal estate, and all his real estate whatsoever and wheresoever, upon trust, to pay unto the testator's nephew, Richard Benstead, an annuity of £10, (to be continued such time only as the annuitant should be incapable of working at his business or doing anything to get his living), out of the interest, dividends, rents, and annual produce of his real and personal estate, for his absolute use and benefit, then upon trust to

Residuary devise and bequest on trust to pay the dividends, interest, and annual produce of the testator's real and personal estates to the separate use of his daughter or daughters for life, and after her or their decease, to pay, transfer, and equally divide the whole of his real and personal estate among the issue of his daughter or daughters; and for want of such issue to pay certain legacies, and to

sell the residue of the real and personal estate not consisting of money:—*Held*, to entitle the tenant for life to the enjoyment of the personalty *in specie*.

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pay to or permit and suffer the testator's wife to receive all the residue of the interest, dividends, rents, and annual produce of the testator's real and personal estate during the term of her natural life, for her use, and the bringing up of such the testator's child or children that might be living at the time of his decease, or born in due time afterwards, during the term of her natural life. And the testator directed that in case his wife should marry again, his trustees should pay to his wife, after payment of the annuity of £10, out of the said interest, dividends, rents and annual produce of his said real and personal estate, the sum of £50 per annum; and as to the residue of the interest, dividends, rents and annual produce of his real and personal estate, the testator directed that it might be paid and applied towards the bringing up and educating of such of the testator's child or children that might be living at the time of the second marriage. And the testator directed that the interest, dividends, rents and annual produce of his real and personal estate, payable to his wife during the term of her natural life, should be for her separate use. The subsequent trust was in the following terms:—"And after the decease of my said wife, upon trust, to pay and apply the interest, dividends, rents and annual produce of my said real and personal estate, towards the bringing up and educating such my child or children that may be then living, until he, she, or they attain the age of twenty-one years: then to pay, transfer, and equally divide the same between them; if boys, for their separate use and benefit absolutely, and if but one child or boy, then to pay and transfer the whole of my real and personal estate unto one child; but in case there shall be no boy, then, upon trust, to pay the interest, dividends and annual produce of my said real and personal estate unto such my daughter or daughters that may be living, during the term of their natural lives, and that the same shall not be subject to the control, disposition, or engagement of any person or persons with whom my daughter

or daughters may happen to intermarry as the same is intended for her or their sole and separate use and benefit; and after her or their decease, upon trust, to pay and transfer, and equally divide the whole of my real and personal estate unto and amongst the issue of such of my daughter or daughters that may be living at the decease of any such my daughter or daughters; but in case there shall be no such issue, then I hereby give and bequeath the following legacies; unto the said Thomas Scott, the further sum of £30, for his sole use and benefit. Unto the said Titus Wood, the further sum of £34, for his sole use and benefit. Unto Ann Benstead, daughter of my brother Joseph, the sum of £30, for her sole use and benefit. And as to all the rest and residue of my personal estate and real estate, which does not consist of money, I direct the same to be sold, and the money arising therefrom, together with such other my personal estate that consists of money, to be paid to and equally divided between my nephews—Joseph, Richard, Gregory, Edward, Shadrach, and Meshach Benstead, for their sole and separate use and benefit, absolutely.”

The testator died on the 2nd of November, 1842, leaving his widow and an only child, Rosanna Amelia Hunt (who, with her husband, were defendants,) him surviving. The widow had since died.

The suit was instituted on behalf of the infant children of Mr. and Mrs. Hunt, against the surviving executor of the will, Mr. and Mrs. Hunt, and the parties other than the plaintiffs interested after Mrs. Hunt's decease, to have a new trustee appointed, and for a declaration as to the propriety of converting the testator's leasehold property into money.

Mr. *Wigram* and Mr. *Osborne*, for the plaintiffs.

Mr. *Lloyd*, Mr. *Tennant*, and Mr. *Bennet*, for the several defendants.

All parties concurred in asking the Court to decide the

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question as to the conversion of the leasehold estate without the usual class inquiries.

The VICE-CHANCELLOR said he would read the will and give his decision on a future day.

March 31st. The VICE-CHANCELLOR:—

The question in this case I understand to be, whether, the testator's wife being dead, his only child, a daughter, is entitled for her life to his chattel leasehold property, in its actual state; or whether it ought to be sold, in order that the purchase-money may be invested, she taking for her life the income to arise from the investment. This question (the testator having had real estate when he made his will) has appeared to me one of some difficulty, considering the decisions that have taken place within the last fifteen years, or, perhaps, I should rather say notwithstanding those decisions. The conclusion at which I have arrived is, that *Alcock v. Slopers* (a), *Collins v. Collins* (b), and several subsequent cases having been determined as they were, I ought to say, that, under this will, the testator's daughter is entitled to enjoy the chattel leasehold property for her life in its actual state, and that it cannot, therefore, be sold during her life.

The following was the form of the declaration:—

“All parties requesting that the Court would declare the construction and effect of the will of Richard Benstead, as respects the chattel leasehold property of which he died possessed: Declare that the defendant, Rosanna Amelia Hunt, the daughter of the testator and wife of the defendant, is entitled to enjoy the leasehold property in the pleadings mentioned, for life, in its actual state, and that the same cannot be sold during her life.”

(a) 2 M. & K. 699.

(b) 2 M. & K. 703; and see *Pickering v. Pickering*, 4 Myl. & Cr. 289.

1847.

NECK v. GAINS.

THIS was a suit arising out of partnership transactions, and was for discovery and relief.

The bill was filed on the 30th October, 1846.

To this bill a plea was filed on the 23rd January, 1847, and on the 12th of February plaintiff obtained the usual order to set down the plea for argument.

On the 13th of February, the three weeks within which, by the Orders of 1845, the plaintiff was bound to set down the plea for argument, expired, but the plaintiff did not set it down until the 15th February.

On the 20th February, the Court, after argument on motion, ordered the defendant's plea to be struck out of the book of causes, as having been set down irregularly after the time for setting it down had expired, with costs.

On the 22nd of February, the plaintiff moved specially for leave forthwith to set down the plea for argument, or that the plaintiff might be at liberty to amend his bill as he might be advised; but, after argument, the Court declined to make any order.

On the 10th of March, Mr. *Toller* took an order, ex parte, for the dismissal of plaintiff's bill, on the ground that the plaintiff had not set down the plea for argument, nor served an order for leave to amend, nor undertaken to reply to the defendant's answer within three weeks, the time limited by the 49th Order of 1845.

Mr. *Wigram* and Mr. *Stevens*, for the plaintiff, now moved that the order of the 10th of March might be discharged for irregularity, on the ground that the 47th, 48th, and 49th of the Orders of 1845, under which the order must have been intended to be supported, did not warrant it, the defendant's plea to the bill not being to all the discovery, and, therefore, not to the whole bill; so that the

March 19th.
May 23rd.

Upon a bill filed for discovery and relief, a plea to all the relief, but not in form to all the discovery, is not a plea to "the whole bill" within the meaning of the 48th and 49th Orders of May, 1845; and where, after the expiration of three weeks, a defendant having so pleaded to all the relief, but not to all the discovery, obtained as of course an order to dismiss the bill:—*Held*, that such order was irregular.

An order to amend after a plea to all the relief, and an answer to the discovery asked by a bill, is not to be obtained as of course under the 66th Order of May, 1845, and an order so obtained was discharged with costs.

March 19th.

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plaintiffs were entitled to discovery, even though they might have lost the right to relief upon the pleadings. They cited Mitford on Pleading, 4th edition, p. 184.

Mr. *Russell* and Mr. *Toller*, for the defendant.—Admitting the old law to be as the plaintiffs contend, it has been altered by the 117th Order of 1845. The plaintiff cannot now reply to the plea. The answer is in support of the plea. For what purpose can the bill be considered to be in court? The 49th Order of 1845 gave the plaintiff three weeks to take three steps, neither of which was taken, and the plea has, therefore, brought the suit into such a state, that no relief can be had on the bill; consequently, the plea must be held to be a plea to all the bill. It was the plaintiff's fault, that he did not take one of the three steps within the three weeks; if he had, he would have been entitled to discovery. As he has not done so, the effect of the Order of 1845 is, that the plea must be taken to be good in fact as well as in law. It follows that it is competent for the defendant, by an order of course, to have the bill dismissed.

The VICE-CHANCELLOR:—

Ever since I have known this Court, I have considered a plea to the whole bill to be one thing, and a plea to all the relief, and part only of the discovery, to be another. Assuming my impression to be correct, I construe the general order, speaking of a plea to the whole bill, as not meaning a plea to a part of the bill. If, therefore, this order can only be sustained under the 49th General Order, it is irregular. I am of opinion, that if the 49th General Order had been intended to apply to such a case as the present, it would have been expressed in different words.

Let the order be discharged with costs.

The defendant afterwards filed his answer, giving the

discovery asked. On the 17th of April, the plaintiff applied to the Master for leave to amend his bill, which the Master refused.

On the 7th of May, the plaintiff obtained, on petition as of course, an order for leave to amend.

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Mr. *Russell* and Mr. *Toller*, on the part of the defendant, moved that such order might be discharged for irregularity ; and cited *Taylor v. Shaw* (a), to shew, that after a plea to the whole relief sought by the bill, an order to amend could only be obtained upon a special application.

May 28th.

Mr. *Wigram* and Mr. *Stevens*.—*Taylor v. Shaw* depended on the orders of the Court then in force, and is not now applicable. It cannot apply to a case under the 65th Order of 1845, which is express in its terms, and not confined to the case of an answer to the whole bill, but is applicable to the case of a plea to part, and an answer to the residue of the bill.

The VICE-CHANCELLOR discharged the order with costs.

(a) 2 Sim. & St. 12.

1847.

March 23rd.

CUTTS v. RIDDELL.

A. being a provisional committee-man of a provisionally registered joint-stock company, was called on by a committee appointed to wind up the affairs of the company, to contribute his share towards the expenses. On his declining to do so, they, by arrangement with a creditor of the company, brought an action against A. in the name of the creditor, for the amount due to the latter. A. then filed his bill for and obtained an injunction to restrain the proceeding at law. On the coming in of the creditor's answer, admitting the above facts, but stating that the committee, who were suing in his name, would guarantee A. from all liability on his contributing £75, being his proportion of the expenses of the company, the Court continued the injunction on the terms of A. bringing that amount into Court.

THE bill in this case stated, that all the defendants, except one named Barber, were in September, 1845, the promoters of a certain railway intended to be called "The Great Leeds and London direct Railway," and that for the purpose of carrying such their agreement into effect, they undertook and promoted the formation of a partnership or joint-stock company, to be called "The Great Leeds and London direct Railway Company," the capital whereof was to consist of £2,500,000, in 100,000 shares of £25 each, and in respect of which the sum of 2*l.* 12*s.* 6*d.* for each share was to be deposited; and that the said company was to be formed in such manner as by an act of Parliament made and passed in the 8th year of the reign of Her present Majesty, intituled "An Act for the Registration, Incorporation, and Regulation of Joint-stock Companies," is enacted and provided in that behalf.

That in pursuance of the premises the said defendants, so promoting and undertaking as aforesaid, made to the Registry Office, by the said act of Parliament provided, proper returns of the proposed name and business or purpose of the said company, and also of the names, occupations, and places of business and residence of the said promoters, and thereupon procured the provisional registration at the said Registry Office of the said particulars so returned by them, and upon such registration became entitled to and obtained from the said Registry Office a certificate of provisional registration, pursuant to and in manner provided by the said act: that the said promoters did not, nor did any or either of them proceed to make public, either by way of prospectus, hand-bill, or advertisement, their intention or purpose to form the said com-

pany until after the provisional registration had been effected, and the certificate thereof had been obtained in manner aforesaid: that certain of the defendants together with divers other persons were appointed, and consented and agreed to act as members of a provisional committee, for the purpose of generally superintending the affairs of the said company, and that the plaintiff also consented and agreed to become a member of the said provisional committee: that, after obtaining the certificate of provisional registration, the promoters duly opened subscription lists, and proceeded to allot shares in the said company, and they caused a prospectus to be printed and circulated, containing a list of the names and residences and descriptions of the several members of the provisional committee of the said company, in which list were inserted the name and residence and description of the plaintiff; and the said prospectus also contained the names of the engineers, solicitors, bankers, and brokers of the said company, and together with a description of the objects of the said company, and of the terms and conditions of subscription thereto.

The bill then set out the prospectus, in which was the following passage:—"The subscribers will be held liable only to the extent of their first deposits, until an act of Parliament is obtained, and afterwards only to the amount of their subscriptions."

The bill proceeded to state that the plaintiff accepted his appointment as a member of the provisional committee aforesaid, and acted as such, and, amongst other things, attended a meeting of the members of the provisional committee, which was convened or assembled upon the business of the said company, and at which various resolutions were agreed upon, and directions given with respect to the management and concerns of the said company; and that the plaintiff also applied for, and agreed, in writing, to take shares in the capital or joint-stock of the said company, and that he thereby became a subscriber to

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the said company, within the meaning of the said act of Parliament.

That, by the means aforesaid and otherwise, the plaintiff became liable at law to the various creditors of the said company for the amount of their respective demands, and, amongst others, to a defendant named Barker for an amount claimed by him as hereinafter mentioned.

The bill proceeded to state, that the defendants (except the defendant Barker) received large sums on account of the company, adequate and applicable to liquidating the debts of the company; and that it had been agreed at a meeting of the company, held on the 19th of December, 1845, that the affairs of the company should be wound up.

The bill also alleged, that the defendants (except Barker) refused to pay the debts owing by the company, which were to a large amount, in consequence whereof the creditors threatened to proceed at law against the plaintiff.

The bill also stated, that the debt of the defendant Barker originally amounted to £2750, of which £1000 had been paid to him on account, and that the debt had been assigned by defendant Barker to or in trust for the other defendants, and that he had empowered the other defendants to use his name in any action they might think proper to institute against any member of the original committee for recovery of the £1750, or any part thereof, upon being indemnified as to the costs.

The bill proceeded to state, that the defendant Barker, at the request of the other defendants, had brought an action at law against the plaintiff for the amount of his debt, as a trustee for and upon the indemnity by the other defendants, and that the plaintiff had applied to all the defendants to refrain from suing him, which they declined to do, unless the plaintiff would pay to the defendants, other than Barker, a considerable sum of money, which they untruly alleged that the plaintiff was liable to pay as a member of the said

provisional committee; and the bill charged, that the said defendants, except Barker, were availing themselves of the action for the purpose of indirectly compelling the plaintiff to pay such sum.

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The bill charged, that there were 400 persons holders of shares in the company, and that their interests were sufficiently represented in the suit by the defendants, other than Barker.

The bill prayed an injunction against Barker restraining him from proceeding in the action at law, and against all the other defendants, restraining them from proceeding with any other action in the name of a creditor against the plaintiff, or from parting with the money or assets of the company otherwise than in payment of its liabilities, or in managing the business of the company (so far as the same could be carried on), so long as any liabilities should remain; and that, for the purpose of ascertaining, if necessary, the amount of and the particulars of the present assets and liabilities of the company, all proper accounts might be taken, the plaintiff offering to pay such sum as he ought properly to pay in respect of the matters in the bill mentioned.

Upon this bill the plaintiff obtained, for want of answer, the common injunction, restraining the defendant Barker from proceeding with the action, and restraining him and all the defendants from instituting any other proceedings at law against the plaintiff until answer or further order.

The defendant Barker, by his answer, admitted the above facts stated in the bill, so far as they affected the question; but he stated his belief, that the committee of management and finance committee were anxious to discharge the debts of the company, and that the original debt due to him was 3043*l.* 4*s.* 6*d.*, but that, in consequence of the difficulties of the company, he had agreed to receive £2750, upon condition that £1000 should be paid down, and that

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the balance of £1750 should be paid as soon as funds should be obtained for that purpose.

He stated that the funds in the possession of the said finance committee were inadequate to pay all the debts of the company, including the debt to him, and to make anything like a fair return of any portion of the amount of their deposits to the shareholders, in consequence of the refusal by a large number of the provisional committee-men, including the plaintiff, to pay the deposits upon their shares.

He admitted that, to secure the more speedy payment of the residue of his demand upon the company, he had authorised the committee of management to make use of his name in any action they might find it necessary to commence against any members of the provisional committee who might persist in their refusal to pay their deposits upon their shares, or to contribute their fair quota towards the expenses of the company.

The same defendant stated it as his belief that the committee of management were endeavouring to wind up the affairs of the company in such manner as should be just towards all parties; and he admitted payment of part of his debt, and submitted and insisted that his security for the payment of the remainder would be diminished if the proceedings in the action were stayed. He also stated it to be his belief that the committee of management were willing to guarantee the plaintiff from the consequences of all such liabilities, upon payment of the sum of £75; and that he believed that the defendants forming the committee of management were availing themselves of the action, for the purpose of indirectly compelling the plaintiff to pay the said sum of £75, and no further or other sum; and that the plaintiff had refused to pay the sum mentioned, on the ground that he was not liable for the same.

He admitted that the attorney acting for the plaintiff in the action was also the attorney of the other defendants.

Upon this answer the defendant Barker obtained an

order nisi for dissolving the injunction, so far as related to him.

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Mr. *Bacon* and Mr. *Heathfield* now shewed cause against dissolving the injunction.—The bill is framed on the authority of the case of *Fernihough v. Leader* (a), which was in its circumstances similar to the present, and in which the injunction was sustained. They also referred to *Lewis v. Billing* (b). The principle on which the Court is asked to interfere and restrain the action is, that it is not *bonâ fide* for the benefit of the person bringing the action, but is used as a screw to enforce a contribution between other parties.

Mr. *Swanston* and Mr. *Malins*, for defendant, distinguished the cases of *Fernihough v. Leader*, and *Lewis v. Billing*, and insisted that Barker had done nothing to deprive himself of his legal remedies for a debt which the plaintiff by his bill admitted to be clearly due at law.

The VICE-CHANCELLOR:—

The plaintiff is entitled to have the injunction continued, upon the terms of bringing into Court in this cause £75, without prejudice to any question, within a fixed time,—say on or before the 15th of April next.

The order was made accordingly.

(a) 4 Railway Cases, 373.

(b) Id. 414.

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April 16th.

Where an insolvent, on his return from attending the Court of Bankruptcy on his own petition for protection, under 5 & 6 Vict. c. 116, was arrested under an attachment of the Court of Chancery, his application to the Court of Chancery to be discharged was held improper, and refused.

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THIS was a motion on behalf of a defendant in the suit, named M'Donald, that he might be discharged out of the custody of the governor of the Queen's Prison, having been arrested at the suit of the plaintiff, whilst on his way home, on leaving the Court of Bankruptcy, in which he was a suitor.

By an order made in the cause of the 25th day of March, 1846, it was referred to the Taxing Master to tax the plaintiff his costs of the suit, and it was ordered that such costs, when taxed, should be paid by the defendant M'Donald and another defendant.

The costs were taxed at 338*l.* 6*s.* 10*d.*, and the defendant M'Donald was served with a subpoena for payment of the amount.

On the 3rd of April, 1846, the defendant filed a petition in the Court of Bankruptcy for protection, under the act 5 & 6 Vict. c. 116.

On May 21st, 1846, the Court of Bankruptcy dismissed the petition, whereupon the defendant filed another petition, and obtained an interim order for protection on the same day. This petition was heard on the 25th of June, and was also dismissed.

He then filed a third petition, which was heard the 20th of August following; and on the 18th day of March, 1847, which was appointed for a further hearing, the Commissioner (Mr. *Holroyd*) adjourned the petition *sine die*, with liberty for the defendant to come up again for his final order when he should have been in custody at the suit of the plaintiff for six months, or when the plaintiff had had for six months the opportunity of imprisoning the defendant, and had neglected to do so.

After the Commissioner had so decided, and after the defendant had left the Court of Bankruptcy, he was arrested

at the suit of the plaintiff for non-payment of the costs awarded against him.

He was then at his own request taken again before Mr. Commissioner *Holroyd*, to whom the defendant's counsel applied in open Court for his discharge. Mr. Commissioner *Holroyd*, however, refused to discharge him, on the ground that the privilege from arrest was that of the Court and not of the defendant; that the Court was not bound to exercise such privilege, and that the Commissioner considered the circumstances of the case to be such, that the Court ought not to interfere.

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Mr. *Rogers*, in support of the motion.—The decision of the Commissioner against the application does not prejudice the present motion, inasmuch as the Commissioner had no power to discharge the defendant. In *Walters v. Rees* (a), a plaintiff was attending the execution of a writ of inquiry on an action brought in the Court of Common Pleas, where judgment had gone by default, and while attending the inquiry he was arrested on process of the Court of Exchequer. The Court of Common Pleas held that the under-sheriff, before whom the inquiry was proceeding, could not discharge the plaintiff, but that the Court might; Mr. Justice *Parke* saying—"Neither an arbitrator nor a commissioner of bankruptcy is empowered to discharge a person arrested during attendance before them, much less an under-sheriff, who in this case merely acted as an officer to the sheriff. There is no reason, therefore, to attach any blame to him: and in *Watkin v. Webb* (b), it was held that a defendant arrested by *quo minus*, while protected by the privilege of this Court, may be discharged either by this Court or the Court of Exchequer." The case of *Watkin v. Webb*, to which Mr. Justice *Parke* alluded, is conclusive in favour of the petitioner; for, in that case, the defendant had been in the Court of Common Pleas

(a) 4 Moore, 34.

(b) 3 Anst. 941.

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a party in a cause, which was referred, under a rule of the Court, to arbitration. The defendant went to a coffee-house to be ready to attend the arbitrator, and whilst waiting there was arrested by process of the Court of Exchequer. On his applying to that Court for his discharge, the Court at first doubted whether it would not be more proper to apply to the Court of Common Pleas, but on consideration it was held that either Court might discharge him.

Mr. *Russell* and Mr. *Elderton*, for the plaintiff.—Whatever might have been the power of the Commissioner before the act 5 & 6 Vict. c. 116 passed, there can be no doubt that, under that act, the Commissioner can exercise a discretion as to giving protection to parties presenting petitions for relief under the statute. The Commissioner here thought the petitioner was not entitled to protection, and adjourned his petition *sine die*.

In *List's case* (a), Lord *Eldon* said—"If a person going to make an affidavit before a Master was arrested, this Court would discharge him, but a Judge would not, as the application must be to that Court of which the proceeding is a contempt." So, in *Castle's case* (b), a solicitor was arrested on his way to Lincoln's-Inn Hall, where he was attending as a solicitor in bankruptcy, and Lord *Eldon* ordered him to be discharged, and agreeing that the application must be intitled in the bankruptcy. And *Kinder v. Williams* (c) is referred to by Lord *Eldon* in *Ex parte King* (d), as proceeding upon the principle that the application to a Court of which no contempt has been committed, is wrong. This motion, therefore, ought to have been made, if at all, under the jurisdiction in bankruptcy. But, we submit, that it ought not to be made at all, because the great difference between this case and that which has been referred

(a) 2 Ves. & B. 374.

(b) 16 Ves. 412.

(c) 4 T. R. 377.

(d) 7 Ves. 313.

to, is, that here the defendant was not attending under any process of the Court, but was attending voluntarily in support of an application which had been already twice refused.

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It is true, that in *Ex parte King* (a), Lord *Eldon* said, he should pause before he should determine that a creditor merely attending to prove his debt was not privileged; and we do not dispute that a plaintiff is entitled to protection as well as a defendant, but it is widely different to say, that a party may protect himself from process by making repeated and groundless *ex parte* applications to a Court, which dismisses them upon their merits. The Commissioner, who has the powers of a court of record, has disposed of the application, and after that it is impossible to say that a contempt of that Court has been committed, or that its privileges have been violated. They also cited *Yearsley v. Heane* (b). [The *Vice-Chancellor*.—Independently of any authority the other way, I should have thought that there was very much in the case cited from *Anstruther*. But *List's case* contains a clear dictum of Lord *Eldon*.]

Mr. *Rogers*, in reply.—The dictum in question does not appear in the report of the case by Sir *George Rose*, who was one of the counsel engaged in it, although, according to that report, the case is stated to have stood over to ascertain on what grounds Mr. Justice *Le Blanc* had refused to discharge the petitioner, with a view to determine the question of costs: *Ex parte List* (c). [The *Vice-Chancellor*.—I cannot suppose that the other report is incorrect, although independently of authority, as I have said already, I should have thought that a Court ought not to permit its process to be used contemptuously towards another Court.] At all events it is only a dictum, and the decision did not in any manner turn upon it.

(a) 7 Ves. 316.

(b) 14 M. & W. 322.

(c) 2 Rose, 24.

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The VICE-CHANCELLOR:—

It is not necessary to say what I should have done if this application had been made to me in the jurisdiction in bankruptcy, or what I should have done if the dictum attributed—correctly I presume—to Lord *Eldon*, in *List's case*, were not in existence. With that dictum before me, I cannot discharge the defendant, but must refuse the application.



April 16th
 & 26th,
 and
 June 24th.

RAVEN v. KERL.

Where the Master has expunged matter in a state of facts for impertinence, he should nevertheless issue his certificate thereupon, in order that the opinion of the Court may be taken if requisite.

To such certificate exceptions may be taken.

Semble, that an exception to the report for that the Master has found the said state of facts impertinent, from the word "&c." to the word "&c.;" where as the Master ought not so to have found, but ought to have found that the same was not impertinent, is pertinent.

Where there is a doubt as to a passage being impertinent, it should be retained and considered on the question of costs.

A REFERENCE had been directed to the Master to inquire whether the suit was for the benefit of the infant plaintiffs.

On this reference, some of the defendants carried in a state of facts, and an affidavit in support of it.

The plaintiffs, under the 73rd Order of April, 1828, complained of matter contained in the state of facts and affidavit, on the ground that it was impertinent, and took out a warrant under the above order, for the Master to examine such matter.

On the examination, the Master, having heard the question argued by counsel, expunged portions of the state of facts and affidavit as impertinent.

The defendants then applied to the Master for a certificate of his decision upon the point, with the view of appealing from it, but the Master declined to give any certificate, on the ground that it would not be a correct practice under the 73rd Order of April, 1828.

The defendants then presented a petition, praying that the Master might be directed to issue his certificate.

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Sir *Francis Simpkinson* and Mr. *Stinton*, in support of the petition, cited *Phipps v. Henderson* (a).

Mr. *Wigram* and Mr. *Fooks*, for the plaintiff.—The 73rd Order of April, 1828, provides that the Master shall have authority to expunge any matter which he shall find to be scandalous and impertinent, not that he shall issue any certificate respecting it.

The VICE-CHANCELLOR:—

This Court must have some means of reviewing the decision of the Master. The case cited seems to prove this; and, independently of that authority, I think it reasonable to make the order sought.

His Honor's opinion was intimated to the Master upon the point; but the Master declined to issue a certificate without an order directing him to do so.

Application was consequently made on this day for an order, which was accordingly made, whereby it was ordered that the Master should issue a certificate of his decision on the pertinency or impertinency of the state of facts and charge of the petitioners, William Kerl, Thomas Kerl, and Henry Kerl, brought before him, and of the affidavit of the petitioners and others in the petition mentioned, and, after such certificate should be made, such further order should be made as should be just.

April 26th.

The Master, by his certificate dated 28th of May, 1847, (made in pursuance of the above order), certified that, in pursuance of the 73rd General Order, bearing date the 3rd

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day of April, 1828, and of the above order of the 26th of April, 1847, he had, in the presence of the solicitors for the plaintiffs, and for the defendants the petitioners, looked into and considered the said state of facts and affidavit, and that the solicitor for the plaintiffs had complained of certain matter introduced into the said state of facts and affidavit, on the ground that such matter was impertinent; and he certified that he had accordingly examined such matter, and found that the said state of facts and affidavit were impertinent in the several particulars following; that was to say—the said state of facts was impertinent from and including the word “that” in the twenty-fourth line from the top of the first sheet, and thenceforth down to and including the word “effect” in the third line from the top of the eighth sheet, and from and including the word “from” in the fourth line from the top of the said eighth sheet down to and including the word “others” in the fifth line from the top of the said eighth sheet.

And the certificate designated other passages, and also passages in the affidavit, as impertinent, in the same way.

And the Master certified that, being of opinion that the said state of facts and affidavit were impertinent in the matters thereinbefore referred to, he had, in pursuance of the authority given to him for that purpose by the said 73rd General Order of the 3rd day of April, 1828, expunged all the said impertinent matter from the said state of facts and affidavits.

On the 4th of June, exceptions were filed to the certificate in the following form:—

First exception:—“For that the said Master, in and by his said certificate, has certified that the state of facts of your petitioners therein mentioned is impertinent from and including the word ‘that’ in the 24th line from the top of the 1st sheet, and thenceforth down to and including the word ‘effect’ in the 3rd line from the top of the 8th sheet, whereas the said Master ought not so to have certified,

but he ought to have certified that the same was not impertinent."

There were six other exceptions in the same form.

The exceptions to the certificate now came on to be argued.

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Sir *Francis Simpkinton* and Mr. *Stinton*, in support of the exceptions to the certificate.—In *Wagstaff v. Bryan* (a), Sir *John Leach* held, that an exception for impertinence must be supported *in toto*, or must fail altogether, and that the exception must be overruled if it included any one passage which was not impertinent. And in *Tench v. Cheese* (b), the present Master of the Rolls said, "If any part of the matter complained of as impertinent is not so, the whole exception fails, although some part of the matter complained of be in fact impertinent." Now, here some parts of the expunged passages are undoubtedly pertinent, and, therefore, the certificate cannot stand. They also referred to *Byde v. Masterman* (c).

Mr. *Wigram* and Mr. *Fooks* objected that, as the impertinent matter was actually expunged, exceptions could not be taken. They also referred to *Norway v. Rowe* (d), and *Montrieu v. Carrick* (e).

The VICE-CHANCELLOR referred to *Parker v. Fairlie* (f), and *Davis v. Cripps* (g).

Sir *F. Simpkinton*, in reply.

The VICE-CHANCELLOR :—

The question in this case arises upon the 73rd Order of April, 1828, which provides as follows :—

- (a) 1 R. & Myl. 28.
- (b) 1 Beav. 571.
- (c) Cr. & Ph. 265.
- (d) 1 Mer. 347.

- (e) 6 Jur. 97.
- (f) Turn. 362.
- (g) 2 Y. & C. C. C. 430.

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“That if any person wishes to complain of any matter introduced into any state of facts, affidavit, or other proceeding before the Master, on the ground that it is scandalous or impertinent, or that any examination taken in the Master’s office is insufficient, he shall be at liberty, without any order of reference by the Court, to take out a warrant for the Master to examine such matter, and the Master shall have authority to expunge any such matter which he shall find to be scandalous or impertinent.”

I believe it to have been decided, (and, if so decided, it has been, in my opinion, rightly decided), that there is an appeal from the Master to the Court with respect to any proceeding in the Master’s office under this order.

In this case, however, the matter considered by the Master impertinent has been actually expunged, and that circumstance has been suggested as a reason against allowing the exceptions.

I am aware of the practice, and that it has been held to extend to cases out of the provisions of the 73rd Order; but the question is, whether it applies to cases under the 73rd Order, where the Master has expunged the passage in question at the time, or substantially at the time, when he expresses his opinion upon it, without affording the party an opportunity of coming to the Court before the passage has been actually expunged. That is the course which has been taken in the present instance. I am of opinion, that, under these circumstances, the Court ought not to accede to the proposition that the mere fact of the passages in question having been expunged, is an answer to the exceptions.

Then it is said, that the passages which the Master has expunged, or some of them, contain, at least, some pertinent matter, if they contain also some which is impertinent; but with regard to this, it is asserted on one side, and denied upon the other, that the form of the exceptions precludes the Court from attending to such a point; it

being made a question, whether the allegation "whereas the said Master ought not so to have certified, but he ought to have certified that the same is not impertinent," is a divisible or an indivisible allegation. I am not quite certain that this point ought to be treated as conclusively settled by decision, or as clear independently of decision. In the allegation, however, "but he ought to have found that the same is not impertinent," the words "the same" must mean a certain passage consisting of several lines, namely, the passage referred to in the preceding allegation, "for that the said Master has certified that the said state of facts is impertinent, from and including" &c., "to and including" &c.

The last allegation denies that so much as is here included is impertinent, and, probably, according to correct rules of interpretation, the person who makes this allegation maintains his proposition if any part is not impertinent. If that be a correct view of the case, there are some of these exceptions which I should be disposed to hold as falling within the scope of the remark.

But I had rather not decide the case on such grounds. I had rather decide it upon the principle on which I decided *Davis v. Cripps* (a), following in substance what Lord Eldon had laid down in *Parker v. Fairlie* (b). Viewing this case with reference to the principles on which those cases proceed, I am of opinion that the danger would be greater of rejecting that which stands at present rejected, than of retaining it. Whatever may be the meaning of the word "pleadings" in the 122nd Order of 1845, as to which I give no opinion, the Court has, independently of that order, the means of providing for the costs of any proceedings unnecessarily long, and, if this be the case, justice may be done fully and completely with regard to any increase of costs improperly occasioned by any passages which may be prolix and impertinent without expunging; whereas, if

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(b) Turn. 362.

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the passages in question are relevant, the mischief, which might be occasioned by expunging them, might be irreparable. Without, therefore, saying that in any substantial respect, I shall not deal with the passages as the Master has done, when the question of costs comes to be decided; I think the safer course at present is to allow the passages to stand, with a reservation as to the costs, which perhaps the Master could not make, but which, following Lord *Eldon*, I made in the case to which I have referred.

The passages must therefore stand; and the registrar will refer to the form of the order in *Parker v. Fairlie*, and will take care to shew upon the order that the Court intimates no opinion which would prevent it from giving the complaining parties all their costs at a future stage of the cause.

Where one of the principal facts relied upon by defendants, contending, on a reference before the Master, that a suit was not for the benefit of the infant plaintiffs, was, that the assets were too small to justify the proceeding: — *Held*, that, as this fact could not be properly determined by the Court, on exceptions to the report, finding in favour of the prosecution of the suit, such exceptions must be overruled, reserving the costs, and detaining the deposit.

ON the 20th of November, 1847, the Master made his report, under the original order of reference, setting forth the substance of a state of facts which had been laid before him on behalf of the plaintiffs, and of the affidavits in support of it, and of the counter state of facts and affidavit, which had been laid before him on behalf of some of the defendants, and on which the above reported decisions were given. By the latter state of facts, after stating circumstances to shew the unhappy terms on which the father and next friend of the infant plaintiffs, and his wife (a defendant), had lived together, and which ultimately ended in their separation, it was stated and supported by affidavit that the next friend many times threatened that when the testator died, he would throw his affairs into Chancery, and ruin the family, or to that effect,

But, upon the plaintiffs afterwards presenting a petition to confirm the report, the Court, on the defendants undertaking to offer no obstacle to the cause being heard, whenever the plaintiffs should think fit, directed the petition to stand over till the hearing.

Quære, whether the proper mode of appealing from the Master's decision, in such a case, is by filing exceptions, or by opposing the petition to confirm the report.

and other circumstances were stated and deposed to, with a view to shew that the suit was instituted from pique and improper motives, and it was also stated and sworn that the property which was the subject of the suit was too small in amount to justify such a proceeding. The Master however certified, that, upon due consideration of both the states of facts, and of all the evidence, he had disallowed the defendants' state of facts, and was of opinion that the suit was instituted with a view to the benefit of the infant plaintiffs, and that it was for their benefit, and ought to be prosecuted.

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To this report the defendants filed two exceptions. *First*, for that the Master had certified that he had disallowed the defendants' state of facts, whereas, he ought to have allowed it; and, *secondly*, for, that the Master had stated, that he was of opinion, that the suit was instituted with a view to the benefit of the infant plaintiffs, &c. whereas he ought not so to have stated; but ought to have certified that the suit was not instituted with a view to the benefit of the infant plaintiffs, and that it was not for their benefit, and that it ought not to be prosecuted.

Sir *Francis Simpinkson* and Mr. *Stinton* supported the exceptions.

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Mr. *Wigram* and Mr. *Fooks*, for the plaintiffs, after taking a preliminary objection, which they ultimately consented to waive, that the proper mode in such a case of appealing from the Master's decision was by opposing the confirmation of the Master's report, and not by excepting to the finding (a), contended that the Master had come to a right decision.

The VICE-CHANCELLOR said, that one of the material facts on which the propriety of the institution of the suit depended, namely, the condition and amount of the assets to be administered, could not be regularly or properly as-

(a) See *Otley v. Pensam*, 1 Hare, 324; *Beavan v. Gibert*, 8 Bea. 308.

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certained till the accounts in the cause had been taken under the decree; and that, however much the judge individually might be inclined to believe the accuracy of the defendants' statements respecting the value of the property, the Court could not judicially act upon those representations in the present stage of the cause. The Master's office was the proper place for investigating facts of this description, and possessed facilities for that purpose which the Court had not in the first instance. By the exception to the Master's disallowance of the defendants' state of facts, the Court was asked to affirm a twofold or threefold proposition, viz. that the suit was not instituted with a view to the plaintiffs' benefit—that it was not for their benefit—and that it ought not to be prosecuted. His Honor was unable to affirm such a proposition on the materials before the Court; for assuming the assets to be considerable, it could not be said to be necessarily wrong that a bill should be filed for an account on behalf of the infant plaintiffs, who had a contingent interest in one-sixth part of the general residue of the testator's estate. The same observation applied to the second exception, which, as well as the former, must therefore be overruled, reserving the costs and retaining the deposit. His Honor, however, remarked, that those who conducted the suit were incurring a considerable degree of moral responsibility.

The order was — That the exceptions should be overruled and the deposit retained until further order, and that the costs of the exceptions be reserved until further order; and any of the parties were to be at liberty to apply as they should be advised.

The plaintiffs afterwards presented a petition, praying that the report of the 20th of November, 1847, might be absolutely confirmed; and that the defendants might pay to the petitioners their costs incurred upon the motion for the reference and the reference itself, and all the proceedings thereunder.

Mr. *Wigram* and Mr. *Fooks*, in support of the petition, submitted that an order in the terms of its prayer was a necessary consequence of the decision of the Court upon the exceptions.

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Sir *Francis Simpinson* and Mr. *Stinton*, at the suggestion of the Court, undertook, on the part of the defendants, (who had put in their answer), to interpose no obstacle to the cause being heard, whenever the plaintiffs might think fit, and

The VICE-CHANCELLOR, on this undertaking, ordered, that the plaintiffs should be at liberty to proceed with the cause as they should be advised, notwithstanding the order of reference as to the suit being for the benefit of the infant plaintiffs, and directed the petition to stand over till the hearing of the cause, or further order.

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BY an act of Parliament of the 6 & 7 Will. 4, c. 79, intituled "An Act for vesting Lighthouses, Lights, and Seamarks

A purchase was completed under the powers of an act of Parliament, which

authorised a corporation to purchase property compulsorily. The vendors being under disabilities, the purchase money of their property was paid into court, under the provisions of the act whereby the Court was authorised to order all the reasonable costs, charges, and expenses attending the re-investment of the purchase monies in the purchase of lands, to be settled to the same uses as the property purchased, together with the costs, charges, and expenses of obtaining the proper orders, and of the other proceedings for such purposes, to be paid by the corporation. A contract was entered into for the investment of part of the fund in court in the purchase of certain property free from incumbrances. The title on investigation proved to be subject to numerous incumbrances, and the purchasers' counsel advised that the vendors should procure all the incumbrances to be conveyed to the vendors, so as to shorten the conveyance. The draft reconveyances, eight in number, were submitted to the purchasers' solicitors and settled by their counsel:—*Held*, that the corporation could not be charged with the costs thereby incurred, unless they were incurred with the express consent of the corporation.

A solicitor in carrying in a state of facts to obtain the Master's approval of a contract to purchase, appended a long schedule thereto of the parcels proposed to be purchased. The taxing Master disallowed the charge for drawing, and only allowed for copying such schedule:—*Held*, that such disallowance was proper, although the Master in Ordinary had allowed attendances upon a number of warrants, proportioned to the length of the state of facts, including the schedule:—*Held* also, that the allowances in respect of these attendances were properly considered by the taxing Master as a compensation for other business actually transacted, and in respect of which he disallowed the charges.

The petition of an infant plaintiff in a cause is the petition of his next friend, and the next friend was ordered to pay costs.

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on the coast of England in the corporation of the Trinity House of Deptford Strond, and for making provisions respecting Lighthouses, Lights, Buoys, Beacons, and Seamarks, and the Tolls and Duties payable in respect thereof," power was given to the master, wardens, and assistants of the corporation to purchase the lands whereon the several lighthouses and tolls mentioned in the schedule to the act stood, amongst which were included an island or rock called the Skerries, and the lighthouses and buildings thereon, and the tolls, dues, and duties payable in respect thereof; with clauses of the usual description, providing for the payment into the Bank and the temporary and permanent investment of the purchase money of property belonging to parties under disabilities.

By the section relating to the costs of these proceedings, it was enacted, that, where by reason of any disability or incapacity of the person interested in the before-mentioned light-house, the purchase money should be required to be paid into the Bank of England, and be subject to the order and directions of the Court of Exchequer, under the provisions therein contained, the said Court might order that all the reasonable costs, charges, and expenses attending such purchase, or which might be incurred in consequence thereof, and also of the investment of the purchase monies in real or government securities, and likewise the re-investment of such purchase monies, or the government or real securities purchased therewith, in the purchase of houses, buildings, lands, tenements, and hereditaments, together with the costs, charges, and expenses of obtaining the proper orders, and of the other proceedings for such purposes, and of the payment of the dividends and interest of the said government or real securities, and of the payment of the principal of the said purchase money of the government or real securities purchased therewith out of court, should be paid by the master, wardens, and assistants. And it was thereby enacted, that the said master, wardens, and assistants should

from time to time pay such sums of money for such purposes as the Court should direct, out of the monies applicable to the purposes of the said act.

Certain shares in the Skerries lighthouse, and the toll dues and duties payable in respect thereof, belonged to one Morgan Jones, who declined treating for the sale of his interest; and the value of such shares was assessed by a jury at 141,475*l.* 5*s.* 8*d.*

Mr. Morgan Jones afterwards died, having made his will, dated the 7th of December, 1837, whereby his share in the Skerries lighthouse became vested in John Jones for life, with remainder to Morgan Jones the younger for life, with remainders to the first and other sons of Morgan Jones in tail male, with divers remainders over.

The conveyance to the corporation of the Trinity House was perfected after Mr. Morgan Jones's decease, and his share of the purchase money was invested in the purchase of 141,660*l.* 10*s.* £3 per cent. Consolidated Bank Annuities, in the name of the Accountant-General, to an account "Ex parte the Corporation of the Trinity House of Deptford Strond and John Jones." Mr. John Jones, the tenant for life, then contracted with Mr. Thomas Howe and others, subject to the approval of the Court, by an agreement dated the 6th of July, 1843, for the purchase of an estate for £96,000, to be paid out of the fund in court according to the provisions of the act; and the vendors agreed, within six weeks after the approval of the contract by the Court, to furnish an abstract of title to the property, and deduce a good title to them, the said Thomas Howe and the other contracting vendors, (except that, as to a small part of the Saltmarsh, no other than a title by possession should be required). The agreement contained other stipulations, and among them was one, that the vendors should, as soon as a proper order should be obtained for the completion of the purchase and the payment of the purchase money, execute, and procure to be executed by all other necessary parties, if any, a proper conveyance

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and settlement of the property, and the fee-simple and inheritance thereof, free from incumbrances, except as therein mentioned, to, for, and upon such uses, trusts, intents and purposes, and in such manner as the Court should direct; and that such conveyance and settlement should be prepared by the purchaser, and the expense thereof borne in manner prescribed by the act, or in such other manner as that the vendors might not in any case be liable to any part thereof. A reference was directed as to the fitness of the proposed investment, and the Master reported in favour of the above contract, and afterwards on another reference reported in favour of the title.

In the course of these proceedings, Mr. John Jones, the first tenant for life, died, and Morgan Jones his son, the next tenant for life under the will, instituted a suit by David Howell, his next friend, against William Lewis and Thomas Morgan and others, to carry into effect the trusts of Mr. Morgan Jones's will. An order in the suit and in the matter of the act was made on the 28th of June, 1845, confirming the Master's report, approving the title; and a sum sufficient to pay the purchase money was directed to be raised out of the fund in court, and it was ordered that the money to arise by such sale should be paid to the person or persons to whom the Master should certify the same to be due; and it was referred to the taxing Master to tax the reasonable costs, charges, and expenses of the purchasers attending the purchase of the estate comprised in the contract, or which had been incurred in consequence thereof, together with their costs, charges, and expenses of obtaining the proper orders, and of the other proceedings for such purposes, and of completing the conveyance of the estate, and attending thereon, and that the corporation should pay the said costs, and charges, and expenses, to the defendants William Henry Lewis and Thomas Morgan, and to David Howell the infant plaintiff's next friend, respectively.

Under this order the taxing Master had taxed the costs,

and had disallowed certain costs relating to the purchase, to the amount of 253*l.* 10*s.*, under the following circumstances.

By reason of there being numerous heavy and complicated incumbrances, and outstanding estates, the purchasers' counsel had advised that releases should be taken to the vendors by separate deeds, and eight reconveyances and releases were accordingly prepared by the vendors' solicitors, and sent to the purchasers' solicitors, by whom they were submitted to counsel for approval.

The vendors being unable to pay off the incumbrances on the estates except out of the purchase money, the drafts required considerable alterations, which the purchasers' counsel settled, in order to adapt them to that circumstance.

The plaintiff presented his petition, objecting to such disallowance.

Mr. Bacon and *Mr. Pitman*, in support of the petition.—
The costs disallowed are of three classes:—

First, the costs of perusing and settling the eight releases and reconveyances from the different incumbrancers, and the fees to counsel thereon. The Master disallowed them on the suggestion of the corporation, who contended that the proper course was for the vendors to perfect their title by such deeds of release and reconveyance, and to have then supplied an abstract of such deeds in the same manner as if such deeds had been executed previous to the date of the contract. To this objection the answer is, that the estate having, upon the completion of the contract, become the property of the purchaser in equity, the vendors (being, in effect, trustees for the purchaser) should not deal with the legal estate without the concurrence of the purchaser; and that, accordingly, it is the practice of conveyancers in such cases for the purchaser's counsel to approve of the drafts before the deeds are executed at the purchaser's

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expense; and inasmuch as it is usual for the purchaser's solicitor to attest the execution of the deed of conveyance by all the conveying and confirming parties, and affidavits of such execution would be required for the satisfaction of the Master, so that he might report that the purchase deed had been perfected, on which the Court might order the payment of the purchase money out of court to the purchaser, there would be, probably, a gain on the whole upon the costs, as purchaser's costs payable by the corporation.

Secondly, 12*l.* 13*s.* 4*d.*, taxed off from the charges for drawing the schedule to the state of facts carried in before the Master, for his approval of the contract, the Master having allowed only 4*d.* per folio for copying it. This schedule had been recognised by the Master in Ordinary as part of the documents properly before him, by his allowing a number of warrants on the state of facts, corresponding to its length, including such schedule; and for that reason, if for no other, the charges for preparing it should have been allowed by the taxing Master.

And, thirdly, 4*l.* 10*s.* 8*d.*, the solicitors' fees for perusal of counsel's opinion on the abstracts. These fees are not even commensurate with the trouble or the consideration required.

The VICE-CHANCELLOR was of opinion that, as to the first class of costs, consisting of charges relating to the conveyances to the vendors and to the completion of their title, they were costs which ought not to have been incurred by the purchasers' solicitors without a special bargain with the Trinity House.

As to the second class of charges; as the Master had allowed 4*d.* per folio for the schedule, as a copy, and no more, his Honor saw no sufficient reason to dissent from his decision.

As to the third class of charges, for perusing counsel's opinion, his Honor thought the burthen lay on the respondents to shew that these costs should be disallowed.

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Mr. *Wigram* and Mr. *Lloyd*, for the respondents.—The third class of charges was properly disallowed by the taxing Master. When, by the practice, charges are allowed for business assumed to be done, though not done, it is usual and proper to consider that allowance in respect of other business actually transacted: *Lucas v. Peacock* (a). Here attendances have been allowed on warrants proportioned to the length of the state of facts, whether such warrants were attended or not, giving clear fees, amounting to £23, to the solicitor. So that, in effect, the perusal of counsel's opinion, which may have been actually performed, has been compensated for in the charges for attendances which were not given.

Mr. *Bacon*, in reply.

The VICE-CHANCELLOR.—Upon the explanation given of the practice by the counsel for the respondents, it appears to me, that the disallowance by the taxing Master of the third class of charges is consistent with practice, and not inconsistent with substantial justice. The petition must be dismissed, with costs, not exceeding £20.

Mr. *Bacon* suggested that this being the petition of an infant, the Court would not give costs against him.

The VICE-CHANCELLOR.—I cannot direct the infant to pay costs; but I have always understood, that in a cause in which there is an infant suing by his next friend, a peti-

(a) 8 Beav. 1.

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tion presented by the infant plaintiff is treated as the petition of the next friend.

The Order made was as follows:—

“The Court doth order that the said petition do stand dismissed; and it is ordered, that the Rev. David Howell, the next friend to the petitioner, do pay to the Master, Wardens, and Assistants of the corporation of the Trinity House, Deptford Strond, their costs, not exceeding £20.”

April 19th,
 20th, 21st, &
 23rd.

A. BLAGRAVE v. BLAGRAVE and Others.

J. H. BLAGRAVE v. BLAGRAVE and Others.

A devise of a park to successive tenants for life, with remainder in tail, contained a proviso that neither a specified tenant for life, nor any other person, should mow any part of the park; but there was no executory devise over in the event of this restriction being broken:—*Held*, that the restriction was

one which might be enforced by injunction.

UNDER the will of John Blagrove of Calcott, dated the 9th of November, 1787, the mansion-house and park at Calcott, and extensive estates in the counties of Berks, Oxford, and Somerset, became vested in John Blagrove of Southcot, and John Simeon, as the trustees thereof, upon certain trusts, under which, and by reason of the deaths of preceding tenants for life, Colonel Blagrove the defendant in both suits became tenant for life without impeachment of waste, with remainder to his first and others sons in tail male, with remainders (after intermediate remainders which had failed) to Anthony Blagrove for life, with remainders to his first and other sons in strict settlement.

The tenant for life, in possession of the real estate, was also tenant for life of certain personal estates under the same will, and was the heir-at-law of the surviving trustee of the real estate, but was not a trustee of the personal estate. Two suits were instituted against him. One was instituted by the tenant for life in remainder of the real estate, complaining of mismanagement of that estate, and praying consequential relief, and particularly the removal of the tenant for life in possession from being trustee; the other suit was instituted by the first tenant in tail in remainder, for the same objects as regarded the real estate, but praying also relief in respect of the personal estate:—*Held*, that evidence taken in the former suit was not admissible in the latter, it not appearing that the witnesses were dead, or incapable of being examined.

The Court declined, except on consent, to make one decree in both the above suits.

From the form of the limitations the extent of the legal estate vested in the trustees was doubtful, but they were directed out of the rents to keep the property let at rack-rent in good repair, and had power to renew leases for lives at the existing rents, and at such fines as they should agree for.

The testator's will contained restrictions on the use of the mansion-house and park, and in particular, that neither the testator's wife nor any other person should mow any part of his park, or feed the same with any other cattle than cows, sheep, and deer; but there was no executory devise over in the event of the proviso not being complied with.

The testator gave the household furniture, silver plate, china, glass, and household linen, at his mansion-house of Calcott, as heir-looms, to go with the mansion-house, and directed that an inventory thereof should be made by John Blaggrave of Southcot, and John Simeon, who were appointed the executors of the testator's will.

The real estates were also by the will charged with annuities, of which two only remained payable.

Colonel Blaggrave, the tenant for life in possession under the will, had no children.

Of John Blaggrave of Southcot, and John Simeon—John Simeon died first, and upon the death of John Blaggrave of Southcot, Colonel Blaggrave became, as his heir-at-law, the surviving trustee of the lands devised by the will, but Anthony Blaggrave became the personal representative of the testator.

Anthony Blaggrave, the tenant for life in remainder, had a son, John Henry Blaggrave, who had attained his age of twenty-one, and was first tenant in tail *in esse*, under the limitations of the will.

On the 26th of August, 1842, Anthony Blaggrave filed a bill against Colonel Blaggrave, John Henry Blaggrave, and the two annuitants, alleging several acts of specially prohibited waste by Colonel Blaggrave, in the cutting down of

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ornamental and other oak, ash, and elm trees; the non-repair and falling into decay of the buildings, and the mowing the grass in the park; that Colonel Blagrove had thrown down boundaries, had granted leases beyond his powers, and also, that Colonel Blagrove had otherwise dealt with the devised property in a way unauthorised by the powers given to him by the will; and it was prayed that Colonel Blagrove might be removed from being such sole trustee; that the settled property might be ascertained; and for relief in respect of the leases improperly granted; that the settled estates might be repaired; and for an inquiry as to the damage occasioned by mowing the park; and for a receiver and an injunction.

This suit led to a negotiation that lasted some time, during which preparations were made for mowing a portion of the park.

On the negotiation being broken off, a supplemental bill was filed, praying for an injunction to restrain Colonel Blagrove from (among other things) mowing any part of the park.

On the 29th of October, 1845, J. H. Blagrove filed a bill against Colonel Blagrove, Mr. Anthony Blagrove, and the two annuitants, in respect of the same, and some other matters of complaint; and praying that the extent and situation of the settled property might be ascertained, and the property distinguished from other lands of Colonel Blagrove not in settlement; for a restoration of the fences; for an account of the articles bequeathed as heir-looms, and what had become thereof; and for relief in respect of the leases improperly granted; and also praying that he might be decreed to repair the buildings, that the damage occasioned by mowing the park might be made good, and that the life estate of Colonel Blagrove might be made answerable for what he should be decreed to pay; and for a receiver; but no injunction against mowing was prayed for.

The two suits were substantially for the same objects, except that the second suit alone sought relief in respect of the articles given by the will as heir-looms, and that the supplemental bill in the first suit alone sought an injunction against mowing.

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Mr. *Russell* and Mr. *Glasse* appeared for the plaintiff in each suit.

Mr. *Wigram* and Mr. *Craig* for Colonel Blagrove, the principal defendant in each suit.

Mr. *Lloyd*, for the annuitants, defendants in each suit, and also for J. H. Blagrove, as defendant in the first suit, and for Anthony Blagrove, as defendant in the second suit.

Mr. *Russell* and Mr. *Glasse* asked that one decree might be made in both suits, and referred to a former case in which the same course had been taken.

Mr. *Wigram* and Mr. *Craig* objected.

The VICE-CHANCELLOR said, that, in the case referred to, one suit was destroyed by the bill being dismissed. In the present case there were two suits, both subsisting. It was not a case of cause and cross cause. The two plaintiffs acted together and supported one another, and had a common adversary, Colonel Blagrove. But Anthony Blagrove was entitled to use the answers of Colonel Blagrove in his suit in a manner different from that in which John Henry Blagrove could use the same documents in his, and *vice versa*. There was evidence also in one suit which would not be admissible in the other; these were sufficient, though not the only, reasons for declining, unless by consent, to make one decree in both suits.

The evidence in the suit *J. H. Blagrove v. Blagrove* having

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been gone into, an order was read which had been obtained at the Rolls as of course, upon petition, permitting the plaintiff in this suit to read and make use of the depositions taken in the cause of *Anthony Blgrave v. Colonel Blgrave* in this suit, saving all just exceptions.

Mr. *Russell* and Mr. *Glasse* then proposed to read the evidence in the suit of *A. Blgrave v. Blgrave*. They contended that as there were substantially the same questions in both suits, and the same defences, the plaintiff in this suit was entitled to read as evidence the evidence taken in the other suit.

They cited *Nevil v. Johnson* (a), *Barstow v. Palmes* (b), *Byrne v. Frere* (c), and *The Poulterers' Company v. Askeu* (d), in which last case a decree, in a former suit in which the plaintiff and defendants had been parties as co-defendants, was read as evidence against the defendants in that suit, though it was objected that the decree in the former suit might have been otherwise, if the defendants could have cross-examined the witnesses in the former cause, which as co-defendants they had no opportunity of doing.

They also cited *The City of London v. Perkins* (e), where a bill having been filed to recover against the defendant certain tonnage duty under an alleged custom, the plaintiff, without proving that the witnesses, whose depositions had been taken in two former suits for the recovery of the same species of tonnage, against two other defendants who had resisted the custom under similar defences, were dead, claimed to read such depositions; but the Court of Exchequer refused to give the plaintiff liberty to read them as evidence at the hearing of that cause. However, on an appeal to the House of Lords, it was declared that the

(a) 2 Ver. 447.

(b) Prec. in Chan. 233.

(c) 2 Mol. 157.

(d) 2 Ves., sen., 89.

(e) 3 Bro. P. C. 602.

Court of Exchequer ought not to have refused to grant an order for the plaintiff in equity, to have liberty to read the depositions taken in the two former causes at the hearing of that cause, saving just exceptions.

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Mr. *Wigram* and Mr. *Craig*, in opposition to the admission of the evidence.—The issues raised in each suit are in some particulars different. Colonel Blagrove may have purposely omitted to cross-examine the witnesses in the other suit, their evidence being immaterial in that suit, or may even by a slip have lost the benefit of such cross-examination in that suit; but that is no reason why he should lose those ordinary rights of a defendant in this suit.

It is not pretended that any of the witnesses, whose evidence it is proposed to read, are dead, or that it is impossible to obtain their evidence.

It must be proved that witnesses, whose depositions have been taken in a former suit against other parties having the same interests, are dead, before their depositions can be read as evidence in a subsequent suit against parties having the same interests.

This question arose in *Carrington v. Cornock* (a), where the evidence was that of reputation merely, and that in relation to tithes in the same parish.

But even if the witnesses examined in the other suit had been proved in this cause to have been dead, the question would remain, whether the parties were so relatively marshalled in the other suit as to entitle the plaintiff in this suit to read the depositions against Colonel Blagrove.

Mr. *Russell*, in reply.—The facts of the case of *The City of London v. Perkins* (b) were misconceived in *Carrington v. Cornock*, in which the *Vice-Chancellor* expressly assumed that the witnesses whose depositions were sought

(a) 2 Sim. 567.

(b) 3 Bro. P. C. 602.

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to be read in *The City of London v. Perkins* were all dead, whereas it appears, from the report in *Brown*, that no evidence of their deaths had been offered.

This question could not arise at law, where evidence is not taken in writing, except in very special circumstances.

[His HONOR during the argument remarked, that it rather appeared from the report of the case of *Nevil v. Johnson* (a) that the evidence had not been taken simultaneously in both suits, and that it did not appear whether the witnesses were dead or alive, whereas it must probably be assumed that the witnesses were dead in *Byrne v. Frere* (b)].

The VICE-CHANCELLOR :—

Were the point now before me substantially the same as that decided by the House of Lords in *The City of London v. Perkins*, it would of course be necessary for me to decide in this case in the same manner. Subject to the decision in that case, I am not aware that the present point is governed by decision. In the House of Lords the question was the same in each case, namely, as to the existence of a custom, and there were substantially the same parties, namely, the City of London and the public, and the same objection in each case to the custom: but here the case is, that there is a tenant for life in possession of land subject to a series of limitations under a will, who is also tenant for life of personalty, subject to corresponding limitations, the tenant for life being also the trustee of the real estate, but not of the personalty. Two suits are instituted against him in respect of alleged mismanagement and improper treatment, both of the real estate and of the personalty, one suit being instituted by the person entitled as next tenant for life, the other by the first tenant in tail in existence who comes after the tenant for life in remainder, the plaintiff in the other suit.

The evidence tendered in this suit, which is instituted by

(a) 2 Ver. 447.

(b) 2 Mol. 157.

the tenant in tail in remainder, has been taken in the suit in which the first tenant for life in remainder is the plaintiff; and the question is, whether, without proof or suggestion of the death, or inability to be examined in this suit, of the witnesses examined in the other suit, their depositions shall be read in this suit. I am of opinion, that I am not required by authority, and that I ought not on principle, to allow the evidence so given to be so used.

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The various questions in the cause were then discussed, and the greater part of them were directed to stand over until the result of certain cases which were settled for the opinion of a court of law should be known.

On the discussion as to that part of the prayer of Anthony Blagrove's supplemental bill which sought an injunction against mowing, it was objected, on behalf of Colonel Blagrove, that the restriction could not be enforced, being inconsistent with the nature of the estate, and not having validity given to it by any limitation over; and, further, that it would restrain and fetter the enjoyment of the property in perpetuity in a manner unknown and contrary to the policy of the law.

The VICE-CHANCELLOR, after directing cases for the opinion of a court of law on some of the points raised, granted, but, as his Honor said, with great reluctance, and in Anthony Blagrove's suit only, the injunction sought by the supplemental bill against mowing.

1847.

April 26th
& 27th.

JOHNSON v. KERSHAW.

Whatever may be the general rule, if there be any, as to extending indulgence to a creditor under a composition-deed, who does not claim the benefit of the deed within the time specified therein; that rule does not apply to a creditor who actively refuses to come in under, or assent to the deed within the time limited, and who does not retract such refusal within that time.

The Court refused to receive at the hearing of a cause the deposition of an accountant containing a statement of the result of his examination of partnership account books, where the books on which he made his statement were not in evidence: but, *semble*, that if the books had been in evidence, the deposition of the accountant of the result of his examination of them would be receivable as the evidence of a person of skill.

BY an indenture dated the 16th of March, 1844, made between George Wood of the first part, J. Kershaw, D. Ainsworth, and J. H. Hawes of the second part, and the several creditors of the said George Wood, whose names should be subscribed thereto, of the third part; the said George Wood assigned all his stock in trade, estate, and effects, to the said J. Kershaw, D. Ainsworth, and J. H. Hawes, as trustees upon trusts for sale, and after deducting expenses, to divide the produce unto and between the creditors of the said George Wood, who should come in and execute the deed or assent thereto, and prove their debts in manner therein expressed, within three calendar months after the date of the deed, and by the same indenture the several parties thereto of the third part, creditors of George Wood, released the said George Wood from all liability to them in respect of the several amounts due to them.

Several of the creditors of George Wood executed the deed, and the trustees entered on the duties of their trust.

By another indenture dated the 1st of April, 1844, made between J. Kershaw, D. Ainsworth, and J. H. Hawes (the trustees under the former deed) of the first part, George Wood of the second part, Richard Henry Wood of the third part, and two sureties for R. H. Wood of the fourth part, after reciting the former deed, and that an agreement had been entered into between the trustees and R. H. Wood, for more speedily winding up the trust, and that R. H. Wood had given to the trustees promissory notes for the several sums of 8*s.* in the pound on the several debts of the creditors of the said George Wood, whose names were set forth in the schedule to the deed of April 1st, it was witnessed, that the trustees, in consideration thereof, assigned to R. H. Wood the estate and effects of George Wood, comprised in the deed of the 16th of March, 1844, for

his own use and benefit; and in consideration of such assignment to him, R. H. Wood and his sureties thereby covenanted with the trustees to satisfy all persons who were creditors of George Wood, at the date of the assignment of the 16th of March, whose names were not set out in the schedule to the indenture now being stated, and to indemnify the trustees and scheduled creditors from the creditors of George Wood whose names were not specified in the schedule; but it was stipulated that such indemnity should not extend beyond £1500 in the whole.

It appeared that long previously to March, 1844, George Wood had a partner named Wales, who had since died, and that he was at the determination of the partnership indebted to the estate of his deceased partner in an amount which was unascertained until the month of June, 1844.

It did not appear that George Wood ever communicated the existence of this debt to the trustees of the deed of the 16th of March, 1844, or to R. H. Wood; but it appeared that neither the administratrix of the deceased partner, who had subsequently married, nor her husband, had ever been a party to the deed of the 16th of March, 1844, nor were their names included in the schedule to the deed of the 1st of April, 1844.

Within the three months limited by the deed of the 16th of March, 1844, for George Wood's creditors to come and assent to the deed, viz. in May, 1844, the administratrix and her husband, through their solicitor, demanded payment of the whole balance due from George Wood to his deceased partner, from R. H. Wood, claiming that he was liable to pay them in full by reason of the covenant contained in the indenture of the 1st of April, 1844. Upon this demand a negotiation took place between the administratrix and her husband and R. H. Wood, and the partnership accounts were referred to an accountant, who, in June 1844, ascertained the balance due from G. Wood to his deceased partner to be £345.

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The reference and negotiation ended in an offer being made on the 3rd of June, 1844, by R. H. Wood to the administratrix and her husband, to pay them £250 by way of compromise for the debt of £345, within six months, upon having an assignment of their interest in the late partnership effects.

This proposal was rejected by the administratrix and her husband, in consequence of the guarantees offered for securing payment of the £250 not being satisfactory to them, and after some further discussion the negotiation terminated.

In 1846, the administratrix and her husband instituted the present suit against the trustees and R. H. Wood, charging that under the above circumstances they were entitled to be paid the full sum of £345, or that the accounts of the trust estate should be taken, and that the plaintiffs should be declared creditors for the amount to be found due to them on taking such accounts, and that it might be declared that the trustees and R. H. Wood were severally liable to make good the £345 to the plaintiffs, the bill alleging that the plaintiffs had, within the three months limited by the indenture of the 16th of March, 1844, assented thereto.

R. H. Wood by his answer submitted, that G. Wood remained personally liable to pay the plaintiffs' debt, having concealed its existence from R. H. Wood, until after the 1st of April, 1844; and he also submitted that the plaintiffs having by their conduct refused to come in under the deed of the 6th of March, 1844, for three months, had no rights under it, nor to any benefit under the covenant in the indenture of the 1st of April, 1844, which was intended solely for the indemnity of the trustees.

The answer of the trustees was to the same effect.

G. Wood was made a defendant in consequence of the suggestion in the other defendants' answers that he remained personally liable, but no relief was prayed against him individually, and as against him the bill was set down upon bill and answer.

Mr. *Wigram* and Mr. *Malins*, for the plaintiffs.—The plaintiffs are entitled to fall back on their rights, under the deed of the 1st of April, 1844, in which R. H. Wood covenanted with the trustees to satisfy all the creditors of G. Wood, among whom are the plaintiffs, and as the trustees are as covenantees trustees for the plaintiffs, the plaintiffs are entitled to enforce their rights under the covenant in this Court. They cited *Tomlinson v. Gill* (a), *Gregory v. Williams* (b), *Griffith v. Sheffield* (c).

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Mr. *Russell* and Mr. *Randall*, for the trustees.—The plaintiffs had no claim against the trustees under the deed of the 16th of March, 1844, for they not only did not assent to that deed, but on the contrary claimed adversely to that instrument. They cited *Collins v. Reece* (d).

Mr. *Bacon* and Mr. *J. H. Humphreys*, for defendant R. H. Wood.—The plaintiffs cannot have any claim against R. H. Wood, because they did not come in under the deed of March, within the time limited by that deed; and the covenant by R. H. Wood in the deed of April, was a covenant by way of indemnity only to the trustees.

In answer to a question from his Honor, they declined at the bar to consent to pay the plaintiffs the £250 which was to have been paid under the agreement of June, 1844.

Sir *Francis Simpinson* and Mr. *Little*, for G. Wood.—No case is made, nor is any relief asked against G. Wood, against whom the cause is set down upon bill and answer; and whatever be the result, no relief can be had against him, and he must be dismissed with his costs.

(a) Amb. 330.
(b) 3 Mer. 590.

(c) 1 Eden, 73.
(d) 1 Coll. 675.

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In the course of the argument his Honor referred to *De Burnales v. Fuller* (a).

In support of plaintiffs' case, the evidence of Mr. Peet, an accountant, was tendered, containing a statement of the result of his examination, made in May, 1844, of certain account books of the partnership, between G. Wood and his deceased partner, Wales; but the account books on which he made his statement were not in evidence.

The VICE-CHANCELLOR:—

If the account books had been in evidence, the accountant's statement of the result of his examination of those books, as the evidence of a person of skill, might be receivable; but, inasmuch as the books are not in evidence, I must decline to receive the deposition of Mr. Peet as to their contents, or as to the result of his examination of their contents.

Mr. Wigram, in reply.

The VICE-CHANCELLOR:—

Whatever may be the general rule, if there be any general rule, as to indulgence to a creditor under a composition-deed, who does not claim the benefit of the deed within the time specified in the deed, that rule does not apply to a creditor who actively refuses, (if I may use the expression), to come in under or assent to the deed within the time limited, and who does not retract the refusal within that time; and I think that, upon the evidence in this suit, it is a correct conclusion to say that the plaintiffs have so conducted themselves in the present case.

It appears to me that negotiations were opened which ended in a proposal by Mr. R. H. Wood, not based on an

(a) 14 East, 590, n. ; 2 Camp. 426.

idea that the plaintiffs were to claim under the deed of March, or on the footing of the two deeds of March and April, but on the footing of the plaintiffs having a new and particular right created, as they appear to have supposed, by the deed of April; not a right to treat the trustees as having committed a breach of trust by their assignment to Mr. R. H. Wood, but a right to claim to be paid in full by Mr. R. H. Wood.

If this be the true result of the evidence, and if the suit is not so constituted, and the case is not of such a nature as to entitle the plaintiffs to the benefit of the proposal made by Mr. R. H. Wood in June, 1844, as a binding agreement, the bill must be dismissed, and, as against Mr. G. Wood, with costs.

Mr. R. H. Wood declining at the bar to pay the £250, the bill must be dismissed as against him, without costs.

As to the trustees, their acts having been such as might confuse and mislead parties interested, the bill as against them must be dismissed, without costs.

As to all the defendants, the bill is to be dismissed without prejudice to any other suit the plaintiffs may be advised to institute.

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A will contained a devise of realty, in trust for A. for life, remainder to B. his wife, for life, and, after the death of the survivor, to sell and divide the proceeds equally among the children, whose shares were to be vested at twenty-one for sons, and twenty-one or marriage for daughters, with a proviso postponing payment in the event of any shares vesting in the lifetime of either tenant for life. The will also contained a bequest of stock, in trust to pay the dividends to A. for life, and, on his death, to divide the principal among his children equally, the shares to vest at the same times as were before provided as to the proceeds of the realty; and there was

a proviso, that, in the event of there being no child of A. and B., or all the children dying before twenty-one, or, if daughters, before that age or marriage, the proceeds of the realty and the sum of stock should be divided equally among the members of a defined class of persons who should be living at the death of the survivor of A. and B., or A.'s children or child, as according to the trusts thereinbefore declared the case might require:—*Held*, that the last of these clauses must be read distributively, and that it did not give to B. by implication a life-interest in the stock.

DREW v. KILLICK.

ELIZABETH ELCOCK, by her will, dated the 8th of June, 1835, gave and devised as follows: "I give, devise, and appoint unto George Drew, Thomas Hadden, and Joseph Gideon Slons, all those my freehold messuages or tenements and premises situate in King Street and John Street, Bermondsey New Road, Bermondsey, in the county of Surrey, to hold the said messuages or tenements, ground and hereditaments, unto and to the use of them the said George Drew, Thomas Hadden, and Joseph Gideon Slons, their heirs and assigns for ever; but upon the trusts, and for the intents and purposes, and subject to the directions hereinafter mentioned, expressed, and declared, of and concerning the same, (that is to say) upon trust that they the said George Drew, Thomas Hadden, and Joseph Gideon Slons, and the survivors and survivor of them, and the heirs and assigns of such survivor, do and shall pay unto, or empower or permit and suffer my nephew, William Killick of Camberwell, during his life to receive and take the rents, issues, and profits of my said messuages, tenements, ground and premises at Bermondsey aforesaid, to and for his own use and benefit; and from and after the decease of my nephew William Killick, upon trust that they the said George Drew, Thomas Hadden, and Joseph Gideon Slons, or the survivors or survivor of them, or the heirs or assigns of such survivor, do and shall pay unto, or empower, permit, and suffer Rebecca, the wife of my said nephew William Killick, (in case she should survive

her said husband), to receive and take the rents, issues, and profits of my said messuages, tenements, ground, and premises at Bermondsey aforesaid, to and for her own use and benefit during her life; and from and immediately after the decease of the survivor of them my said nephew William Killick and Rebecca his wife, upon trust they the said trustees or trustee for the time being of this my will, do and shall, if he or they shall so think proper, but not otherwise, sell and absolutely dispose of the said messuages or tenements, ground and premises in Bermondsey, either together or in parcels." After the usual directions with respect to the sale, the will proceeded: "and I do hereby further direct and declare, that the trustees or trustee for the time being of this my will, do and shall stand possessed of, and interested in the said monies to arise from such sale of the said premises as aforesaid, and also of the rents, issues, and profits thereof, to be received from and after the decease of the survivor of them my said nephew William Killick and Rebecca his wife, until sale and disposition thereof as aforesaid, upon trust for all and every the children and child of my said nephew William Killick, lawfully to be begotten, equally to be divided between and amongst them, share and share alike, if more than one, and if there shall be but one such child, then the whole for such one child; the share or shares of such of them as shall be a daughter or daughters to become vested in her or them respectively on her or their attaining her or their age or respective ages of twenty-one years, or on the day or respective days of her or their marriage, which shall first happen; and the share or shares of such of them as shall be a son or sons to become vested in him or them respectively on his or their attaining his or their age or respective ages of twenty-one years, and to be paid or transferred at such age or ages, time or times as aforesaid, to such of the said daughters or sons as shall arrive at or attain the same after the decease of the survivor of them the said William

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Killick and Rebecca his wife ; but as to such of them as shall arrive at or attain such age or ages, times or time as aforesaid, in the lifetime of my said nephew or Rebecca his said wife, the payment or transfer of his, her, or their share or shares to be postponed till after the decease of the survivor of them the said William Killick and Rebecca his wife ;” and after containing the usual accruer clause, and powers of maintenance and of leasing, the will proceeded as follows: “ Also I give and bequeath unto the said George Drew, Thomas Hadden, and Joseph Gideon Slons, the further sum of £1000 Three and a half per cent. Annuities, upon trust that they my said trustees, and the survivors and survivor of them, do and shall immediately after my decease cause the same to be transferred into their names, and do and shall pay the dividends and interest of the said £1000 Three and a half per cent. Annuities, as and when the same shall become due and payable, into the proper hands of my said nephew, William Killick of Camberwell, for and during the term of his natural life, to and for his own use and benefit ; and from and immediately after his decease, upon trust that they my said trustees, or the survivors or survivor of them, do and shall pay, transfer, and divide the said principal sum of £1000 Three and a half per cent. Annuities, or the stocks, funds, or securities in which the same shall be then invested, unto all and every the child or children of my said nephew William Killick, equally to be divided between or amongst them, share and share alike, if there shall be more than one, and if there shall be but one such child, then the whole to be paid or transferred to such only child.

“ And I declare my will to be, that such children or only child of my said nephew William Killick, shall take vested interests in the said £1000 Three and a half per cent. Annuities, at such ages, days, and times, and with such benefit of survivorship and accruer, powers of maintenance and education, and with such limitations and directions as are hereinbefore directed respecting the share of

the said children of my said nephew William Killick, of and in the monies to arise by the sale of the said freehold estate in Bermondsey."

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Then came the following clause, upon which the question arose:—"Provided that if there shall be no child of my said nephew lawfully begotten, or there being one or more such child or children, if such of them as shall be a son or sons shall die before he or they shall attain the age of twenty-one years, and such of them as shall be a daughter or daughters shall die before she or they shall attain her or their age or respective ages of twenty-one years, or be married, then and in such case I do hereby direct that the monies arising from the sale of the said freehold estate in Bermondsey, and also the said sum of £1000 Three and a half per cent. Annuities, or the stocks, funds, or securities in which the same respectively shall be then invested, shall be paid and transferred unto the children of my said brother William Killick, and the said John Elcock Killick, or such of them as shall be living at the death of the survivor of them the said William Killick and Rebecca his wife, or his children or child, as according to the trusts hereinbefore declared the case may require, equally, share and share alike."

The testatrix died in 1837, and William Killick, her nephew, died in 1845, without ever having had a child. The surviving trustee of the will instituted the present suit to obtain the opinion of the Court upon the question whether the widow took a life interest in the sum of stock by implication, or whether that sum was immediately divisible among the children of the testatrix's brother and of John Elcock Killick.

Mr. *Shadwell* appeared for the plaintiffs.

Mr. *Follett*, Mr. *Bourdillon*, Mr. *Steere*, Mr. *Farrer*, Mr. *Thring*, and Mr. *Hobhouse*, for the several defendants,

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cited *Dansen v. Hawes* (a), *Wyndham v. Wyndham* (b),
Harrison v. Forman (c), *Browne v. Lord Kenyon* (d), *Sturges*
v. Pearson (e), *Harris v. Lloyd* (f), *Scott v. Scarborough* (g),
Willis v. Plaskett (h), *Stone v. Harrison* (i).

The VICE-CHANCELLOR:—

May 8th.

The question for decision in this cause is as to the disposition of the dividends of the £1000 Three and a half per cent. Annuities particularly mentioned in the testatrix's will, during the interval between the death of the testatrix's nephew, William Killick of Camberwell, mentioned in her will, who survived her, and was her residuary legatee, and the death of Rebecca his wife, when the will was made, and now living, his widow, whom the will also mentions: the admitted state of circumstances being, that he never had a child, that Rebecca his widow is his personal representative, and that he was a son of the testatrix's brother, William Killick, several children of whom are now living, as well as the testatrix's great nephew, John Elcock Killick.

This question appeared, and still appears to me, one of some difficulty. The claim of Rebecca to the disputed income, either in her own right, or in right of the residuary legatee, whom she represents, is plausible at least, and has been supported by an argument of considerable merit. Supposing that claim to fail, are the dividends to accumulate during her life or any part of it, (the testatrix having died certainly not before the year 1835), or to be allowed at once to be received beneficially by all or any of those who claim against Rebecca? It appears to be plain enough, that as

- (a) Amb. 276.
- (b) 3 Bro. C. C. 58.
- (c) 5 Ves. 207.
- (d) 3 Mad. 410.
- (e) 4 Mad. 411.

- (f) Turn. 310.
- (g) 1 Bea. 154.
- (h) 4 Bea. 208.
- (i) 2 Coll. 715.

against any child of William Killick the nephew, at least against any child of that nephew living to attain majority, or being a daughter, marrying, the claim of Rebecca, neither in her husband's right nor in her own, could have been sustainable. The question, however, is of course very different whether it is sustainable in the events that have happened. I have considered the cases mentioned at the bar in the course of the argument, and some others, particularly *Shaw v. Cunliffe* (a), a case which may be thought perhaps not very widely to differ from the present, though certainly it does differ.

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In this will the words "as according to the trusts hereinbefore declared the case may require," seem to me important. They are part of a clause which begins with the words "provided that if there be no child," and ends with the words "share and share alike." That beginning and that end, with all that comes between them, form, I conceive, one single clause, one single passage, of which every word ought to be taken into consideration for the purpose of properly understanding any portion of it.

The words "trusts hereinbefore declared" may, and must then I suppose, be read as referring to the trusts declared of the stock, as well as those declared of the Bermondsey purchase-money, for the two funds are the subject of the clause; and if this is so, the immediately preceding phrase, commencing "or such of them as shall be living at the death of the survivor," ought in my judgment to be read as referring to the title to the two funds respectively, as referring to the period at which, with regard to each severally, should cease the interest or interests in previous parts of the will created, of which the failure was a preceding condition to the taking effect in possession of the limitation to which it was the purpose of the clause to subject each of the funds, not as referring

(a) 4 Bro. C. C. 144.

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singly, merely, or absolutely to the time of the decease, either of the longer liver of William the nephew and Rebecca, or of the longest liver of William and Rebecca, and his child or children, if any.

The word "survivor," then, (an expression frequently in wills interpreted as not literally intended, and as not referring to continuance of life), ought, I conceive, in effect to be read here as meaning "one last interested," and applied distributively to each fund, according to the state of its title, a construction which, if otherwise right, as I consider it to be, is not in my judgment rendered inadmissible or improper by the mere circumstance that Rebecca, the only one of the enumerated persons not, under the express trusts, interested in both funds, was, under those express trusts, tenant for life of only one of them.

Whatever then may become hereafter of the Bermondsey property, I think that the stock belongs now in possession to John Elcock Killick, and the children of William Killick, the testatrix's brother, who were living at the death of William Killick the nephew, in equal shares absolutely: an opinion, of the correctness of which, however, I am so far from confident, that I would have longer delayed my decision, had I not become convinced that I could not usefully give further consideration to the matter. That I think this decision consistent with *Wyndham v. Wyndham*, *Shaw v. Cunliffe*, and *Harris v. Lloyd*, it is unnecessary for me to say, for they are binding cases.

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REECE v. TRYE.

MARY TRYE REECE was, at the date and execution of the indentures of the 23rd and 24th days of July, 1819, hereafter stated, as devisee under the will of her great aunt, Catherine Longford, deceased, seised in fee-simple of certain messuages, tenements, lands, and hereditaments, in the parish of Withington, in Gloucestershire, called the Foxcote estate.

By indentures of lease and release, bearing date respectively the 23rd and 24th days of July, 1819, the lease being expressed to be made between Mary Trye Reece, of the one part, and Robert Younghusband, since deceased, and the defendant, Henry Norwood Trye, of the other part; and the release being expressed to be made between Thomas Young Lester, of the first part, Mary Trye Reece, of the second part, and Robert Younghusband and the defendant, of the third part, in consideration of a marriage then intended to be solemnized between the said Thomas Young Lester and Mary Trye Reece, the said Mary Trye Reece, with the consent of the said Thomas Young Lester, conveyed and assured the Foxcote estate unto the said Robert Younghusband and Henry Norwood Trye, and their heirs, to the use of the said Mary Trye Reece, her heirs and assigns, until the said then intended marriage should be solemnized; and after the solemnization thereof to the use of the said Thomas Younghusband and Henry Norwood Trye, their heirs and assigns, during the lives and life of the said Thomas Young Lester and Mary Trye Reece, and the survivor of them, in trust, during the life of the said Mary

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By an antenuptial settlement lands of the wife were released to the use of the releasees to uses and their heirs during the joint lives of the husband and wife, and the life of the survivor, on certain trusts, with a limitation to the use of the wife in fee, in the event (which happened) of there being no issue of the marriage. After the death of the husband, who survived the wife, the surviving releasee to uses, with a tenant in possession of the land under a lease from the husband, made a feoffment, and levied a fine to the use of himself in fee :—
Held, that a court of equity might entertain a suit instituted by the heir-at-law of the wife against the releasee to uses, to recover possession of the land and the title-deeds.

Semble, that the surviving releasee to uses after the determination of his own legal estate had no rightful title to the custody of the title deeds, and could not be considered as holding them as a trustee for the reversioner; but,

Semble, that the fine was fraudulent, and that, whether void at law on that ground or not, the question of its validity ought not of necessity to be left to the decision of a court of law.

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Trye Reece, to pay the rents and profits of the said Foxcote estate into her own hands, for her separate use, and for which her receipt alone was to be a discharge; and after her decease, and during the life of the said Thomas Young Lester, in trust for him and his assigns; and after the decease of the survivor of them, the said Thomas Young Lester and Mary Trye Reece, and failure of the issue of the said marriage, to the use of the said Mary Trye Reece, her heirs and assigns for ever.

The marriage between said Mary Trye Reece and Thomas Young Lester was solemnized on the 27th day of July, 1819, and Mary Trye Reece died in the year 1820, without leaving or having had any issue. She left Thomas Young Lester her surviving, and he died on the 25th of February, 1829.

At the death of Thomas Young Lester, and for some time prior thereto, Edward Meadows and Thomas Reeves were in possession of the Foxcote estate, as the tenants thereof, and they continued in possession as such tenants until after the making and levying of the feoffment and fine hereinafter mentioned; and prior to and after the death of Thomas Young Lester, Edward Meadows and Thomas Reeves paid the rents of that estate to the defendant, Henry Norwood Trye, as trustee under the indenture of release of the 24th day of July, 1819.

The bill stated that, until shortly before the plaintiff commenced the action of ejectment thereafter mentioned, he was not aware that he was entitled to the Foxcote estate, nor aware of the limitations contained in the indenture of release of the 24th of July, 1819, or that, in fact, any such indenture had been made and executed, although the defendant, at or shortly after the death of Thomas Young Lester, well knew that the plaintiff was the heir-at-law of Mary Trye Reece, and entitled to the Foxcote estate, and concealed from the plaintiff the existence of the indenture of release; nor until after the action of ejectment was com-

menced, was the plaintiff aware that the feoffment fine after mentioned had ever been made or levied.

In the month of September, 1843, the plaintiff requested to be let into the receipt of the rents and profits of the Foxcote estate, and, upon the 18th of November, 1843, he commenced an action of ejectment against the defendant to recover the possession of that estate. The action was tried at the Gloucester Assizes, on the 17th of August, 1844. Upon the trial the defendant proved in evidence an indenture of feoffment, dated the 19th day of January, 1830, and made and duly executed between and by the defendant Henry Norwood Trye and Alicia Harriett, his wife, of the first part, Edward Meadows and Thomas Reeves of the second part, and John Aubrey Whitcombe of the third part, whereby the defendant and Edward Meadows and Thomas Reeves granted and enfeoffed unto John Aubrey Whitcombe, and his heirs, the Foxcote estate, to hold the same, with its appurtenances, unto John Aubrey Whitcombe and his heirs, to the use of the defendant, his heirs, appointees, and assigns, for ever, and the defendant thereby covenanted with J. A. Whitcombe to levy a fine *sur cognizance de droit come ceo*, &c. with proclamations, to be thereupon had pursuant to the statute in that case provided, to the use of the defendant, his heirs, appointees, and assigns, for ever; and the defendant also proved in evidence, that the indenture of feoffment was duly perfected by livery of seisin to J. A. Whitcombe, and that afterwards in or as of Hilary Term in the 10th George the 4th, the fine, by the indenture of feoffment agreed to be levied, was duly levied, wherein J. A. Whitcombe was plaintiff, and the defendant and his wife were deforciantes, and that the fine was duly proclaimed. Upon this evidence a verdict was given for the defendant H. N. Trye in the action.

J. A. Whitcombe, one of the parties to the fine and feoffment, was the attorney and solicitor of the defendant.

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The bill alleged, that, at the death of T. Y. Lester, the tenancies of the Foxcote estate by E. Meadows and T. Reeves, parties to the indenture of feoffment, were not determined, but that they continued to hold the estate until after the making of the feoffment and livery of seisin thereunder, upon the same terms as they held the same at the death of T. Y. Lester; and the bill submitted that they thereby became, and were, at the making and execution of the indenture of feoffment, and at and after the livery of seisin thereunder, tenants of the estate under the plaintiff as the heir-at-law of M. T. Reece, and that they were bound to defend the title of the plaintiff.

The defendant had, prior to the making and levying of the feoffment and fine, in his possession or power, the indentures of the 23rd and 24th of July, 1819, and other title deeds and evidences of title of the Foxcote estate, and he obtained the possession thereof as a trustee under those deeds.

The bill charged, that, although the defendant acquired at law an indefeasible estate of fee-simple in the Foxcote estate, yet that in equity the feoffment and fine were fraudulent and void against the plaintiff; and the prayer of the bill was, that it might be declared that the feoffment made and fine levied of the Foxcote estate were fraudulent, and in equity void against the plaintiff; and that the defendant might be decreed to reconvey and to procure all other necessary parties to convey to the plaintiff, or as he should direct, the Foxcote estate (except a certain cottage and garden which had been sold by the defendant), and to deliver up to the plaintiff, or as he should direct, the possession of the same estate (except the cottage and garden), and to account for and pay to the plaintiff the value of the cottage and garden, and the rents and profits of the Foxcote estate since the death of T. Y. Lester, and to deliver up to the plaintiff the indentures of the 23rd and 24th days of July, 1819, and all other the title deeds and evidences of title in his possession or power



relating to the estate, the plaintiff thereby offering not to question or dispute the title of the purchaser of the cottage and garden, nor to question or dispute the title of certain mortgagees under the defendant, until what was owing to them respectively should have been paid by the defendant, and that he might be decreed to make such payment.

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Mr. *Wigram* and Mr. *Chapman Barber*, for the defendant, objected that the mortgagees ought to be parties to the suit.

The VICE-CHANCELLOR, after hearing Mr. *Russell* and Mr. *Bird* for the plaintiff, held the objection to be valid, but on the plaintiff's undertaking not to question the mortgagees' title, the cause was allowed to proceed.

Mr. *Russell* and Mr. *Bird*, for the plaintiff.—The suit must at all events succeed to the extent of the prayer for the delivery of the deeds. The defendant as feoffee to uses was entitled to the custody of the deeds for the benefit of the *cestuis que usent*, and therefore in the character of trustee. He has made use of his possession to the prejudice of his *cestui que trust* for the purpose of committing a fraud. This therefore constitutes a title to the interference of a court of equity. [The *Vice-Chancellor*.—Would he not be entitled to the custody of the deeds as *cestui que use*?] It has been decided, that, as *cestui que use*, he could not recover them in an action of trover. [The *Vice-Chancellor*.—But you do not claim under the settlement, which you seek to have delivered up. Your claim is as heir-at-law. The settlement is only material to your case for the purpose of shewing that Captain Lester's possession was not adverse to your title.] The possession of that deed by the defendant precluded the plaintiff from recovering in ejectment. Under the common law the relessee to uses was the party entitled to the possession of the deeds, and the Statute of Uses does not

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affect those documents which must consequently belong to the releassee to uses as a trustee for the *cestuis que usent*. It follows that the defendant is a trustee upon an express trust for the plaintiff, and cannot be permitted to retain an advantage which he has improperly obtained, to the prejudice of his *cestui que trust*. *Whitfield v. Faussett* (a), *Sacheverell v. Bagnoll* (b), *Earl of Huntingdon v. Mildmay* (c), *Stockman v. Hampton* (d), *Welbie's case* (e), *Warwick v. Braddon* (f), *Cowry v. Caulfield* (g).

In *Jenkin v. Peace* (h) a dictum of Mr. Justice *Heath* was cited to the Court, to the effect that an averment respecting the destruction of a deed which operated under the Statute of Uses was mere surplusage; and Mr. Baron *Alderson* said, "The origin of that rule would seem to be, that a conveyance under the Statute of Uses being to A., to the use of B., B. would not be required to make *profert*, because A. would have possession of the deed." And the Lord Chief Baron, in giving judgment, said, "The next exception, and that, in fact, on which the defendants rely, is that of conveyances under the Statute of Uses. And the reason for this seems to be given in *Stockman v. Hampton* (d), viz. that the party pleading has not possession of the deed, nor any means to obtain it; and so accords the case of *Gray v. Fielder* (i), where, in debt on bond assigned by commissioners of bankrupt, *profert* was not made, and yet it was held good, because, say the Court, he is in by act of law, and had no means to obtain the obligation. These exceptions of deeds operating under the Statute of Uses, probably, therefore, arose from the circumstances that such conveyances were in form conveyances to A., to the use of B., and so A., not B., was considered to have the possession

(a) 1 Ves. sen. 391.

(b) Cro. Eliz. 356.

(c) Cro. Jac. 217.

(d) Cro. Car. 441.

(e) Noy, 145.

(f) 3 Keb. 711.

(g) 2 B. & B. 255.

(h) 6 M. & W. 722; and see Jarman's Conveyancing, by Sweet, Vol. 8, p. 88.

(i) Cro. Car. 209.

of the deed; and, consequently, when B. pleaded it, the judges did not require him to make *profert*. Another reason is to be found in some cases, viz. that the party pleading is not in 'in the *per*,' which is, in fact, only another technical mode of expressing the same thing: if a man is in 'in the *per*,' he is in by the party executing the deed; if in 'in the *post*,' he is in by the party to whom the deed is executed. This appears from Vin. Abridgment, "Feoffment," (A. 4), who states it thus: 'In the case of a feoffment at common law, the feoffee is in in the *per*—*scilicet*, by the feoffor; but in the case of a feoffment by the statute of 2 Rich. 3, the feoffees are in in the *post*, viz. by the first feoffees.' In such cases, therefore, those to whom the deed is executed are presumed by law to have the possession of the deed; and the others, to whose use they hold, not having the deed, cannot be required, when claiming under it by pleading, to make *profert*." It is, therefore, held not to be necessary for a *cestui que use* to make *profert*, on the very ground that the feoffee to uses is entitled to the custody of the deed.

It is not, however, necessary to put the case so high; for in order to affect a party as trustee, it is not requisite to shew that he was actually a trustee, it is sufficient that he acted as trustee: *Shiels v. Atkins* (a), *Pomfret v. Windsor* (b), *Kennedy v. Daly* (c).

But the suit is also well founded as to the possession of the land itself; for the concurrence of Meadows, the tenant, in the feoffment and fine rendered those assurances fraudulent within the principle of *Fermor's case* (d), the first resolution in which is, "Where lessee for years or at will, or tenant by copy of court roll, makes a feoffment by assent and covin that a fine shall be levied, this is not to avoid strife and debate, but by assent and covin to begin strife and debate where none was; and therefore the act doth not

(a) 3 Atk. 559.

(c) 1 Sch. & Lef. 379.

(b) 2 Ves. sen. 481.

(d) 3 Rep. 77.

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extend to establish such estate made and created by such fraud and practice."

Meadows was actually tenant to the reversioner, for Captain Lester died in the middle of the half-year. The rent was received by the defendant. Now, as to an apportioned part, this rent belonged to the reversioner, and the defendant received it as a trustee. Lord *Redesdale's* doctrine, in *Cowry v. Caulfield* (a), applies to this case, it being possible to refer Meadows's possession to a rightful title.

The VICE-CHANCELLOR.—Another question would be whether, where there was a tenant for life without power of leasing, his lessee can say his possession is wrongful, or whether it is only wrongful at the election of the reversioner, who may treat the lease as affirmed, if he think fit.

Mr. *Wigram* and Mr. *Chapman Barber*, for the defendant.—The claim of the plaintiff (if any) is at law. It is not necessary to go into the question, whether the plaintiff could establish a fraud, because that case, if it exists, may be made at law. As to the possession of the deeds, *Harrington v. Price* (b) shews that whoever is entitled to the land is entitled to the possession of the deeds. The title to the possession of them is, therefore, a purely legal one, and the mere circumstance of fraud being alleged makes no difference, since a court of law can try the question of fraud too.

In *Fermor's case* (c), the tenant levied a fine while paying rent to his landlord. But there was no feoffment, no ouster, as in this case. [The *Vice-Chancellor*.—It is the first resolution in *Fermor's case* which the plaintiff relies upon as being applicable here. Suppose Mrs. Lester had been the survivor, and had made a lease and died, and then Trye had said to the tenant, "Attorn to me. I am entitled to the

(a) 2 B. & B. 255. (b) 3 B. & Adolph. 170. (c) 3 Rep. 77.

fee, and we will levy a fine:" how would that have operated?] If a tenant makes a feoffment, and levies a fine, the landlord is ousted. There is no ground for alleging fraud, for the tenant here considered that he was confirming the true title.

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The VICE-CHANCELLOR:—

It is not clear to my mind, whether, supposing all the facts of this case were before a court of law in an action, a court of law would hold that the fine was valid. But assuming that a court of law would so decide this point, it would probably not conclude the question between the parties. The case alleged by the plaintiff is one of fraud, a subject of jurisdiction belonging to a court of equity as well as to a court of law; and, independently of this observation, it is well known that this Court treats as cases of fraud some which are not so treated in courts of law. At present, therefore, I am not satisfied that this matter ought to be left entirely, if at all, to the decision of a court of law. The question is, whether I have before me materials for determining the case, or whether some preliminary inquiries must not be directed. On this question I am ready to hear a reply.

On Mr. *Russell* declining to offer any further observations, his Honor directed a reference to inquire in whose possession, and under what circumstances, the settlement and the other title deeds were, at the time of the marriage of Capt. Lester and Mary Trye Reece, and had been from time to time ever since, and now were; and also when the defendant first claimed to be entitled to the Foxcote estate as heir of Mrs. Lester, and whether, at or before Capt. Lester's death, the defendant was in the receipt of the rents and profits of that estate; and by whom and on whose account, and under what circumstances the rents received in 1828 and 1829 were so received, and in whose occupation the estate was at the death of Capt. Lester, and

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till the levying of the fine; and under what circumstances the feoffment and fine were made and levied; and further directions and costs were reserved.

The cause did not come on to be heard again, having terminated in a compromise.



March 31st
 & April 1st.

MANNING v. CHAMBERS.

Trust funds were settled by deed upon trust, to pay the income to the settlor for life, and, after his death, to pay the income of a part thereof to E. M. for life, or "until he should become bankrupt;" and, after his decease, or "upon his becoming bankrupt," then in trust to pay the income of such part to the wife or widow of E. M., for her separate use, with remainder to the child or children of E. M., with a trust for accumulation in case E. M. should have no such children or wife, and he should have forfeited his life interest. E. M. was, at the time of the execution of the deed of settlement, an uncertificated bankrupt:—*Held*, that the income of E. M.'s share belonged to his wife, for her separate use.

IN the year 1842, John Manning, having determined to make a voluntary settlement upon himself for his life, and for the benefit of his children and grand-children, (amongst the latter of whom were Edmund Manning and Cornelius Charles Manning, the two sons of John Manning the younger, a deceased son of the said John Manning), transferred two sums of stock, viz. 5000*l.* 3*l.* 10*s.* per cent. and 7000*l.* Bank Stock, in the names of himself and of Samuel Manning, his son.

By a deed-poll dated the 14th of February, 1842, John Manning, the settlor, and Samuel Manning declared that they, their executors and administrators, would stand possessed of the said stock, in trust to pay the income thereof to John Manning, the settlor for life, and after his decease, and after setting apart certain funds for specified purposes, it was declared that the trust funds should be held, as to one-ninth part or share of the residue of a moiety of the said trust funds, "upon trust to pay to, or otherwise permit and suffer, the said E. Manning, the eldest son of the said J. Manning, deceased, to receive and take the

Under the same deed, a like part of the same trust funds was settled upon trust for C. C. M., his wife and children, with similar conditions to those expressed concerning the share of E. M.; C. C. M. was, at the time of the execution of the deed of settlement, a bachelor, and an uncertificated bankrupt; C. C. M.'s share was directed to be invested, the income to accumulate.

dividends, interest, and annual income thereof, for and during the term of his natural life, or until he shall become bankrupt, insolvent, or suffer his goods to be taken in execution, or otherwise attempt to mortgage, sell, assign, or incumber his life interest therein: and after his decease, or upon his becoming bankrupt, insolvent, or suffering his goods to be taken in execution, or attempting to mortgage, sell, assign, or incumber his said life interest, then in trust to pay the dividends and income of the said lastly mentioned one-ninth part or share of and in the said lastly mentioned residuary moiety of the said trust funds, unto the wife or widow (if any) of the said E. Manning, for her sole and separate use during her life, but so that she may not anticipate, mortgage, sell, or charge her said life interest therein, and so that her receipts alone, notwithstanding her coverture, may be good discharges for the income arising therefrom; and after the decease of such wife or widow, or upon her attempting to anticipate, mortgage, sell, or charge her said life interest in the said lastly mentioned one-ninth part or share, then upon trust to pay and apply the dividends and interest arising therefrom unto and between all and every the child and children of the said E. Manning, if there shall be any such, in equal parts, shares, and proportions, during the residue of her life, and if there shall be no such child or children, or during such period of his life as he shall have no such children or wife, and he shall have forfeited his life interest as aforesaid, upon trust to accumulate the dividends and income of his one-ninth part or share in the said residuary moiety of the said trust funds for the benefit of his children as hereinafter mentioned; and upon the decease of the said E. Manning, (subject and without prejudice to the life estate and interest of his widow, if any) in trust to pay, divide, and transfer the capital of the said lastly mentioned one-ninth part or share of and in the said lastly mentioned residuary moiety of the said trust funds, and all accumulations of the

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dividends and interest thereof, if any, unto, between, and amongst all and every the child and children of the said E. Manning" as therein expressed, with limitations over to other branches of the family in case of the death of the said E. Manning without leaving any child who should attain a vested interest.

By the same deed it was declared that one other ninth part or share of the residue of the said moiety of the said trust funds (after the decease of the said J. Manning, the settlor) should be held "upon trust for C. C. Manning, the second son of the said John Manning, deceased, his wife and children, for the same or the like estates and interests, and subject to the same or the like conditions, and with the same or the like limitations over as are hereinbefore expressed and declared of and concerning the one-ninth part or share of the said E. Manning, of and in the same residuary moiety of said trust funds and premises, as if the same were here repeated in words at length, and made applicable to said C. C. Manning, his wife and children."

S. Manning died in December, 1842, and new trustees had been appointed under a power in the settlement, to act in conjunction with J. Manning the settlor.

J. Manning, the settlor, died on the 28th of February, 1845.

E. Manning and C. C. Manning, who had been partners in trade as drapers, were declared bankrupts, on the 11th of February, 1842, upon a fiat in bankruptcy issued against them on the 9th of February, (both dates being prior to the date of the declaration of trust). They obtained their certificates on the 16th of December, 1842.

E. Manning was married, and had one child, an infant.

C. C. Manning was a bachelor.

This suit was instituted in April, 1846, by *cestuis que trustent*, under settlement of the 14th of February, 1842, for a declaration of the rights of the parties entitled under it, and to have the trust carried into effect.

E. Manning died in August, 1846, and his widow administered to his estate, and the suit was thereupon revived.

The chief questions in the cause arose upon the construction of the limitations in favour of E. and C. C. Manning, having regard to the fact of their bankruptcy having occurred before the date of the settlement.

Mr. *Malins* and Mr. *J. T. Humphry*, for the plaintiffs.—The intention of the settlor was manifestly to benefit E. and C. C. Manning, and certainly to exclude their assignees in bankruptcy; and it must be taken that the testator did not know of their bankruptcy when he executed the deed of settlement. The words on which the question arises may, when literally construed, refer to the future only; but the Court will, in order to give effect to the intention, treat them as having reference to the event which had occurred: *Yarnold v. Moorhouse* (a), *Wynne v. Wynne* (b), *James v. Durant* (c).

Mr. *Swanston* and Mr. *J. H. Palmer*, for the widow and administratrix of E. Manning, and for C. C. Manning.—By the words, “until he shall become bankrupt” and “upon his becoming bankrupt,” the settlor intended to provide against the effect of bankruptcy, and not merely against the transition to a state of bankruptcy; and although the words ordinarily would imply a transition, they obviously here provide against a *status*. It must be assumed that the settlor was ignorant at the time he executed the settlement, that the event of bankruptcy had actually taken place; for it is very improbable that the settlor would direct trustees to pay income to a party, who was then an uncertificated bankrupt, until he should become bankrupt. *Wilkinson v. Adam* (d) is as to the point under discussion coincident with the present case.

(a) 1 Russ. & My. 364.

(b) 2 Keen, 777.

(c) 2 Bea. 177.

(d) 1 Ves. & Bea. 423.

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Mr. *Bacon* and Mr. *Berkeley*, for the assignees of E. Manning and C. C. Manning.—Messrs. E. and C. C. Manning being bankrupts uncertificated at the date of the settlement, the assignees are entitled to both shares. The bankrupts could not have incurred a forfeiture by an act committed before the execution of the deed.

In *Rex v. Chitty* (a) the Court was called on to put its construction on a clause of the Municipal Corporation Act, similar in effect to the clause in the present deed. By sect. 52 of that act (5 & 6 Will. 4, c. 76) it is provided that, if a person holding the office of mayor, alderman, or councillor for any borough, “shall be declared bankrupt, or shall apply to take the benefit of any act for the relief of insolvent debtors,” or do any other act therein specified, “then and in every such case such person shall immediately thereupon become disqualified, and shall cease to hold the office of such mayor, alderman, or councillor.” Now it appeared that Mr. Chitty had been elected to the office of town-councillor for the borough of Shaftesbury, being at the time of his election and continuing to be an uncertificated bankrupt. And upon the argument on a rule nisi for a quo warranto against him in respect of his being a councillor, the Court of King’s Bench held that the writ would not lie, and that the 52nd section did not apply to a town-councillor, unless he became bankrupt whilst holding the office.

Mr. *Begbie*, Mr. *Borton*, and Mr. *Rogers*, appeared for the other defendants.

The VICE-CHANCELLOR, in the course of the argument, referred to cases of wills where the testator, having had children who had died, and children living at the date of his will, has used words of bequest to the children of his children who should die, using words of futurity, in some of

(a) 5 Ad. & Ellis, 609.

which cases it had been held that children of children of the testator who had died previously to the date of the will were within the scope of the bequest. His Honor mentioned *Tytherleigh v. Harbin* (a), *Giles v. Giles* (b), *Smith v. Smith* (c), and *Jarvis v. Pond* (d); and remarked that in *Rex v. Chitty* (e), one question was not discussed; a part of the case having been apparently taken for granted; and moreover that there might be an arguable distinction between the words "shall be" in the statute, and the words shall *become* in the present trust deed.

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The VICE-CHANCELLOR:—

The clause to be construed is this. [His Honor read it.] It appears that, in point of fact, E. Manning was at the time of the execution of the deed of settlement, an uncertificated bankrupt, the fiat having issued five or six days previously. But according to the true interpretation of the language of this settlement the Court, I think, is bound to decide that the income of Edmund's one-ninth share belongs to his wife for her separate use, from the death of the settlor.

It was reasonable for the assignees to appear and raise the question, and, notwithstanding that I dismiss them, I shall give them their costs out of the trust fund.

As to the share of C. C. Manning, he being a bachelor, the fund constituting his one-ninth share must be brought into court, and accumulate until further order, according to the provisions of the deed.

(a) 6 Sim. 329. (b) 8 Id. 360. (c) 8 Id. 353.
(d) 9 Id. 549. (e) 5 Ad. & El. 609.

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May 5th, 7th,
& 8th.

LANCASHIRE v. LANCASHIRE.

A testator devised real estates to J. H. and A. L., upon trust, immediately upon the happening of either of two events, i. e. his niece's attaining twenty-five or marrying, to settle the same, or such part thereof as the trustees should think proper, to the use of the niece for life, with remainder to the use of her children, as she should appoint, and, in default of appointment, to her children, with remainder to the use of A. L. and her heirs absolutely; and as to such parts as the trustees should not

think fit so to settle (with respect to which the testator gave them absolute discretion), upon trust to convey the same to S. L. (who was the testator's heir-at-law) in fee.

In 1831, J. H. and A. L. proved the testator's will, and accepted its trusts. J. H. shortly afterwards desired to retire from the trust, and a deed was executed, but not in conformity with the trusts, purporting to appoint J. O. a trustee in his stead, but no conveyance was executed to J. O. In 1842, J. H., A. L., and J. O. executed a deed, purporting to be made in exercise of the power of appointment given by the testator's will to his trustees, and thereby appointed the estate to A. L. in fee, J. H. executing this deed, on receiving an indemnity from A. L. and her solicitor.

Held, that the direction to settle was not a power in the nature of a trust which would prevail if no appointment was made, but was purely discretionary, and that the effect of the original trustees remaining inactive was to leave the beneficial interest to result to S. L., the heir-at-law.

Held, also, that the deed of 1842 was not a proper execution of the power.

An heir-at-law, claiming by bill as such, stated his title in detail. The defendants, by their answer, put him to prove such title, but neither asserted nor suggested that there was any other heir. The plaintiff proved his pedigree in the cause.

Held, that the Court might and ought to decide the disputed question of pedigree without sending it to a jury: and it appearing that the evidence of heirship was previously in the possession of a suit, submitted to the defendants, the trustees, and was such as they ought to have been satisfied with, the Court gave the plaintiff the costs of the suit as against the trustees, including the expenses of the genealogical evidence.

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of the same as they should think proper, to the use or for the benefit of his said niece, Sarah Lancashire, and her assigns, for her life, for her separate use, and after her decease to the use or for the benefit of the children of the said Sarah Lancashire, as she should appoint; and, in default of such appointment, and so far as any such, if made, should not extend, to the use or for the benefit of the children or child of the said Sarah Lancashire; and if there should be no such child, then to the use or for the benefit of the said Ann Lancashire, her heirs, executors, administrators, and assigns, absolutely; and as to such part or parts of the said trust estate, monies, and premises, which his said trustees should not think proper to settle as aforesaid, and with respect to which he gave them absolute discretion, upon trust to convey, assign, and transfer the same unto his said niece, Sarah Lancashire, her heirs, executors, administrators, and assigns, absolutely; and the testator directed, that if the said John Hutchinson and Ann Lancashire, or either of them, should depart this life, or decline to act in or for the said trusts, then it should be lawful for the then acting trustee or trustees of his will, with the consent of the person or persons for the time being beneficially entitled to the said trust premises, by any deed or instrument in writing duly executed, to appoint one or more person or persons to act in the room of the trustee or trustees dying or declining to act; and that, upon the appointment of any such new trustee or trustees, the said trust estate and premises should be vested in the new trustee or trustees jointly, with the surviving or continuing trustee or trustees, or separately, as the case might require. And the testator appointed the said John Hutchinson and Ann Lancashire executor and executrix of his will.

The testator made a codicil to his will, dated the 12th of June, 1830, whereby he substituted the age of twenty-five years for the age of twenty-one years fixed by his will, and making some other but unimportant dispositions.

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The testator died in the month of January, 1831, and his will was proved in April, 1831, by John Hutchinson and Ann Lancashire.

The testator's niece, Sarah Lancashire, survived him, and was his heiress-at-law.

A few months after the decease of the testator, Mr. John Hutchinson, who had proved the will, and accepted the trusts thereof, became desirous to retire from the trusteeship, and thereupon Mrs. Ann Lancashire, the continuing trustee, executed a deed, dated the 10th of December, 1831, purporting to appoint her brother James Osborne a trustee of the will of William Lancashire, in the place of John Hutchinson, but no conveyance or assignment of the trust property was made.

Sarah Lancashire, the niece and heiress-at-law of the testator, was not a party to this deed. She attained the age of twenty-five years, and died in the month of July, 1842, intestate and unmarried; and in the month of October in the same year Mrs. Ann Lancashire procured letters of administration to her personal estate.

In August, 1842, Joseph Lancashire claimed to be the heir-at-law of Sarah Lancashire, and, as such, to be entitled to the real estates settled by the will of William Lancashire.

By an indenture, dated the 1st of November, 1842, and made between Ann Lancashire and James Osborne of the first part, John Hutchinson of the second part, the Rev. William Cantrell and Joseph Osborne of the third part, and Ann Lancashire of the fourth part, Ann Lancashire, James Osborne, and John Hutchinson conveyed unto William Cantrell and Joseph Osborne, their heirs, executors, administrators, and assigns, all the real and personal estate which had been by the said will of William Lancashire devised to John Hutchinson and Ann Lancashire, their heirs and assigns, except such part of the same money and securities for money, and other personal estate, as at any time or times

had been rightfully and effectually transferred, assigned, or paid to Sarah Lancashire, by the trustees or trustee of William Lancashire's will, during her lifetime, and also all other the hereditaments and real and personal estate; and as to such money, securities for money and personal estate, whether impressed with the character of real estate or not, which were then subject to the trusts of William Lancashire's will, to hold, receive, and take the said real and personal estate unto the said William Cantrell and Joseph Osborne, their heirs, executors, administrators, and assigns, for ever, according to the nature and quality of the said estates respectively, to the use and for the benefit of the said defendant, Ann Lancashire, her heirs, executors, administrators, and assigns, absolutely and for ever, according to the nature and quality of the same estates respectively.

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Mr. Hutchinson made some objection to executing this deed; and he did not execute it until the 16th of December, 1842, nor until a bond had been executed by Mrs. Ann Lancashire and her solicitor, indemnifying him in respect of his interference in the trust, and specifically in respect of executing the settlement in favour of Mrs. Lancashire.

On investigation, Joseph Lancashire proved not to be the heir-at-law of Sarah Lancashire or of William Lancashire, and gave up all claim.

In November, 1842, the plaintiff, George Lancashire, claimed to be entitled to the residuary real estates of the testator, William Lancashire, comprised in his will, as heir-at-law as well of William Lancashire as of Sarah Lancashire, and he furnished Mrs. Lancashire's solicitor with detail of evidence in his pedigree; but this failed to satisfy Mrs. Lancashire's solicitor.

The plaintiff then instituted the present suit against Mrs. Ann Lancashire and Messrs. Hutchinson, James Osborne, William Cantrell, and Joseph Osborne, the trustees and parties to the deed of the 1st of November, 1842, setting out in the bill his pedigree with great particularity,

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and praying that the deed of the 1st of November, 1842, should be declared void and delivered up to be cancelled.

The defendants, Mrs. Lancashire and Mr. James Osborne, by their answer, put the plaintiff to the proof of his pedigree, but did not suggest that any other person was the heir.

Mr. *Wigram* and Mr. *E. Webster*, for the plaintiff.—As to the deed of the 1st of November, 1842, it is void. Mr. Hutchinson, who had retired from the trust in 1831, was called back to the trust, that he might take part in this act; but the attempted appointment is ineffectual, because the power existed only so long as Sarah Lancashire or her issue lived. They cited *Cook v. Gerrard* (a), *Doe d. Annandale v. Brazier* (b), *Davies v. Thomas* (c), *Harrison v. Foreman* (d), *Skey v. Barnes* (e), *Alleyn v. Belchier* (f), *Cunningham v. Thurlow* (g), *Keates v. Burton* (h), *Piper v. Piper* (i), and *Ashford v. Cafe* (k). The defendants are not entitled to ask the Court to direct an issue on the question of the plaintiff's pedigree: *Lloyd v. Wait* (l).

The VICE-CHANCELLOR.—That case only adds the authority of an eminent judge to the well-known rule, that a court of equity is as much a judge of fact as a jury,—a rule to which the only exception I believe is the case of an heir-at-law disputing a will, an exception introduced or established by a decision of the House of Lords.

Mr. *Bacon*, Mr. *Bazalgette*, and Mr. *Cantrell*, for the several defendants, except Mr. Hutchinson.—The title of the plaintiff as heir-at-law is not made out; the evidence is

(a) 1 Saund. 181.

(b) 5 B. & Ald. 64.

(c) 2 You. & Col. Ex. 234.

(d) 5 Ves. 207.

(e) 3 Mer. 335.

(f) 1 Eden, 132.

(g) 1 Russ. & M. 436, n.

(h) 14 Ves. 434.

(i) 3 M. & K. 159.

(k) 7 Sim. 641.

(l) 1 Phillips, 61.

defective in several particulars, and, at least, enough of doubt arises to entitle the plaintiff to ask for an issue to try the pedigree before a jury.

The right to exercise the power is not limited to the lives of the niece, Sarah Lancashire, and her issue, but it was capable of being exercised in favour of Mrs. Lancashire, who was an object of the testator's bounty, and who had such an interest in remainder in the testator's estate as must have effect, unless the trustees expressly excluded her or distinctly declared they declined to execute the power in her favour; the contrary of which is proved to have been the fact. The gift over to Sarah Lancashire is not in the event of the trustees remaining inactive and doing nothing, but in the event of their settling part and leaving part unsettled. The power is to exclude a portion from the settlement which the testator has provided, but which, if no part is so excluded, must prevail as to the whole: *Boyle v. Bishop of Peterborough* (a), *Houstoun v. Houstoun* (b), *Bray v. Bree* (c), *Butcher v. Jackson* (d). Indeed, there is authority for contending that the power was in the nature of a trust: *Wainwright v. Waterman* (e), *Prebble v. Boghurst* (f).

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Sir *F. Simpinson* and Mr. *Follett* appeared for the defendant Hutchinson.

The VICE-CHANCELLOR:—

May 8th.

In this case it has been contended for the defendants, or some of them, that, according to the true construction of the will in question, an interest in remainder in the disputed property was given to the defendant, Mrs. Lan-

(a) 1 Ves. jun. 299; 3 Bro. C.

C. 243.

(b) 4 Sim. 611.

(c) 2 Cl. & Fin. 453; 3 Sim.
513.

(d) 14 Sim. 444.

(e) 1 Ves. sen. 311; and see
Burrough v. Philcox, 5 Myl. &
Cr. 72.

(f) 1 Swan. 309.

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cashire; that, in order to defeat or displace the interest so given, an intention to exclude her, or to make no settlement, was necessary to be expressed by the trustees; that mere silence, mere inaction, upon the trustees' part, was to operate in favour of the daughter's issue and the mother against the daughter; and that, since an intention to exclude the issue, or the mother, or to make no settlement, has never been expressed by the trustees or any trustee under the will, the person whom Miss Lancashire left her heir *ex parte paternâ* has and had no title, whether the settlement of 1842 was valid or invalid. This, however, is not according to my opinion of the case, upon what I consider the true interpretation of the will and codicil; in the absence of any intention to make a settlement, in a case of mere neutrality on the trustees' part, the title of Miss Lancashire to the inheritance, as against her issue and as against Mrs. Lancashire, must I think be considered as subsisting. I do not say, nor is it necessary that I should say, whether I should have thought so if the clause beginning "and as to such part or parts of the said trust estate," containing the words "absolute discretion," and ending with the words "assigns absolutely," had been omitted from the will, or differently worded.

If, therefore, an intention to make a settlement has never been effectually expressed, and there is nothing more in the case, I think that the property in dispute must be considered as at present belonging in equity to the person (if any) whom Miss Lancashire left her heir, *ex parte paternâ*, supposing that person to be now living. Though, whether this would have been my opinion if Miss Lancashire had not been the heiress of the testator at his death it is unnecessary to say, for she was so.

The question then is, whether the settlement of 1842, made in favour of Mrs. Lancashire, in the circumstances in which it was made, is sustainable. And for the purposes of

this question, though I do not decide, I assume, that the will and codicil were valid against the heir (*a*), and that a state of circumstances might have existed, in which, after the death of Miss Lancashire above the age of twenty-five, and without having married, a settlement not previously determined on might have been well made by the trustees in favour of her mother; though this latter point, under the will and codicil before me, I must, notwithstanding *Boyle v. The Bishop of Peterborough* (*b*) and the cases that have followed it, (authorities which I do not in the least question), be permitted at least very much to doubt. But, as I have said, I assume it in the defendant's favour.

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It has, however, been conceded, and I think correctly, that Mr. Hutchinson did not originally renounce or disclaim, and that he accepted the office of trustee under the will. After his acceptance he desired, in the year 1831, (within a year, I think, after the testator's death) to relinquish and retire from it, and Mr. Osborne, the brother of Mrs. Lancashire, was appointed to succeed him in December of that year. But the appointment was ineffectual and invalid. It was not in conformity with the power contained in the will; Mr. Osborne was not therefore well authorised to act in that capacity, but neither, I apprehend, was Mrs. Lancashire authorised to act as trustee alone,—whether she might have done so if Mr. Hutchinson had renounced and disclaimed without accepting the trusteeship after the testator's death, it is unnecessary to determine.

After Miss Lancashire's death, she having died in July, 1842, unmarried and intestate, but having between the end of the year 1831, and the end of the year 1836, attained

(*a*) This passage refers to statements and arguments which had been introduced into the case, with reference to the validity of the will itself; but which it has not been considered useful to report.
 (*b*) 1 Ves. jun. 299; 3 Bro. C. C. 243.

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her majority, and the power of settling having remained during her life unexercised, Mrs. Lancashire and Mr. Osborne appear to have formed the wish of excluding Miss Lancashire's heir by exercising the power in Mrs. Lancashire's favour, and to have considered that with, but not without, Mr. Hutchinson's concurrence this could be done. Accordingly a settlement, dated the 1st of November, 1842, was prepared and executed in that month by Mr. Lancashire and Mr. Osborne, which was afterwards, upon and not before the 16th of December in the same year, executed by Mr. Hutchinson, who received a bond from Mrs. Lancashire and her solicitor, dated on that day, being a bond of indemnity against Mr. Hutchinson's acts in respect of the estate of William Lancashire, including, in so many words, the act of executing the settlement in Mrs. Lancashire's favour.

Whether, in the absence of all unfairness, and of all circumstances of a suspicious nature, Mr. Hutchinson could, after his retirement and the ineffectual appointment of a successor, have returned effectually, after the lapse of so many years, to the trusteeship for any purpose, I doubt, at least, but need not decide. I find it, however, impossible to say that the act of giving the property in question to Mrs. Lancashire, done, after her daughter's death, under the form and designation of a settlement enabled by the will of William Lancashire, can receive or derive force or validity from the concurrence in it of Mr. Hutchinson, circumstanced as that concurrence was, one of the accompanying circumstances being the bond of indemnity from Mrs. Lancashire and her solicitor. I think that it was not such a transaction as the testator can be thought to have intended to sanction. I think that it was not a fair transaction, and that it must fall to the ground; a conclusion, in my opinion, wholly consistent with every authority cited during the argument. If, therefore, Miss Lancashire, who died intestate, left an heir *ex parte paternâ*, that heir, or

some person claiming under him or in his right, must, I conceive, now be entitled beneficially to the property in question, to the exclusion of all beneficial claim of Mrs. Lancashire under William Lancashire's will; and I think it clearly established by the evidence that Miss Lancashire left an heir *ex parte paternâ*.

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The plaintiff, who was living when Miss Lancashire died, asserts that she left him her heir *ex parte paternâ*. If she did, the suit, as I have said, appears to me well founded. But did she so in fact? Now as to this point, neither of the defendants proves or alleges that any other person than the plaintiff is or was the heir: they put him on proof of his title without asserting or suggesting any other heir. That the plaintiff is clearly shewn to be related to Miss Lancashire *ex parte paternâ*, and so related to her that it was without considerable, or without any improbability possible for him to be her heir *ex parte paternâ* at her death, cannot, upon the evidence, be denied or reasonably questioned. This, however, is not all. It is, I apprehend, proved in detail that Miss Lancashire was through her father the grand-daughter and heiress, and sole surviving issue of William Lancashire the elder; that he (William Lancashire the elder) had a lawful brother of the whole blood named John, who died before Miss Lancashire's birth, and had a lawful son, named Thomas, who also died before Miss Lancashire's birth, and had two lawful sons; that, of those two sons, one died before Miss Lancashire's birth, an infant, without having married, and that the other is the plaintiff. It is said, that the non-existence of any person, who, if existing, would stand, or have stood, as heir on the pedigree before the plaintiff, is not proved. But if this were so (as according to the impression, however, that the evidence makes on me, it is not), still it would be, and is true, that the existence of any such person is neither shewn nor suggested. I am of opinion that, upon the evidence before the Court in a case such as this, to send the question of heirship to a jury

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would be equivalent to a declaration that the Court of Chancery, as a court of equity, is incompetent to decide a disputed question of pedigree, however simple. It is not incompetent to do so, and I consider myself bound to say that the plaintiff's relationship to Miss Lancashire—the fact that he became upon her death the heir of herself, of her father, and of the testator, her paternal uncle, and his consequent title to the property in dispute, are sufficiently and satisfactorily established for every purpose, at least of the present suit. The claims, if any, of persons not bound by the proceedings in this cause may hereafter be asserted against him.

His costs of the suit to this time must, I conceive, be paid by Mrs. Lancashire and Mr. Osborne, including the costs of the genealogical evidence. Considering all that took place before the suit, I think that Mrs. Lancashire and Mr. Osborne might, and ought to have been satisfied as to the pedigree without a suit, and ought not to have resisted the plaintiff's claim.

All future costs must be reserved.

I think that it is not necessary to make Mr. Hutchinson liable to any part of the plaintiff's costs, and that the two new trustees appointed by the settlement should, as well as Mr. Hutchinson, neither pay nor receive costs to this time.

I must declare the invalidity of the settlement. The details of the decree in other respects cannot, probably, be of much complexity.

[This decision has been affirmed by the Lord Chancellor.]

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FURNESS RAILWAY COMPANY *v.* SMITH.*May 22nd.*

BY an act of Parliament of the 6 & 7 Vict. c. 42, the defendant, John Abel Smith, his heirs and assigns, were empowered at his and their own proper costs and expenses, to construct, at or from Rampside to Roe Island, and from Roe Island into Pile Harbour, in the parish of Dalton, in Furness, in the county of Lancaster, on lands belonging to him, a pier or piers, jetty or jetties, with proper works attached thereto; and all necessary or convenient roads, avenues, and approaches thereto, for the reception and accommodation of all ships, boats, and vessels, and for the embarking and disembarking, landing and shipping of passengers, carriages, horses, cattle, and other live stock; and of goods, wares, merchandise, and commodities of any kind, and also, from time to time, to alter and improve the pier or piers, jetty or jetties.

By section 100 it was enacted, that after the expiration of ten years from the passing of the said act, all the powers thereby given to the defendant, his heirs and assigns, for executing the said pier and works or otherwise in relation thereto, should cease to be exercised, except as to so much of the pier and works as should then be completed, and except such powers as should thereby be declared to be continued for a longer period.

The 104th section provided, that, as soon as the pier should be completed, or so far formed that vessels could conveniently lade and unlade thereat, it should be lawful for the defendant, his heirs and assigns, to demand and receive for any vessel which should arrive at, make fast to, or depart from the pier and works, certain tolls therein specified, according to the tonnage-burden of such vessel.

The 105th section provided, that a certificate under the hand of any chairman of the quarter session of the peace

The proprietor of a pier erected under the powers of an act of Parliament, which were to be exercised during a certain limited period, was authorised by the act to demand certain specified tolls for the use of the pier when completed. By an agreement between him and a railway company, he agreed to complete his pier at a considerably earlier time than he was bound to do by the act, and the company agreed to complete a branch railway to the pier by the same time; but the agreement contained no stipulations as to opening the pier or railway, or as to the terms on which the pier was to be used. The owner of the pier completed it accordingly, but refused to permit the railway company to use it, except upon terms to which the company declined to accede. The

Court refused to grant on motion an injunction restraining the owner of the pier from obstructing the use of it by the company at the statutory tolls.

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for the county of Lancaster, should be conclusive evidence that the pier was completed, or so far formed that vessels could conveniently lade or unlade thereat.

The 112th section provided, that, as soon as the pier should be completed, or so far formed that passengers should be able to embark or land from or at the same, every person who should land from or embark in any vessel at or from the pier, and every person who should be on or use the pier, should pay to the defendant, his heirs and assigns, in respect of every such landing or embarkation, and of every time of entering or coming upon the pier, such sum or sums as the defendant, his heirs and assigns, should appoint, not exceeding the sums specified in a schedule to the act.

The 131st section provided that the defendant, his heirs and assigns, should, from time to time, cause to be painted on boards, in large and legible characters, and affixed on the principal office of said defendant, his heirs and assigns, and on some conspicuous part of said pier, a list of the several tolls which should be from time to time payable in respect of said pier, and that no such toll should be payable during such time as such lists should not continue so affixed, or for any matter or thing not specified in such list.

By another act of Parliament, 7 & 8 Vict. c. xxii, the plaintiffs were incorporated by the name of the Furness Railway Company, with certain powers therein specified for making a railway from the defendant's pier to Barrow, in the parish of Dalton in Furness; and the act provided that after the expiration of seven years from its passing, all the powers thereby granted to the plaintiffs for executing the said railways or otherwise in relation thereto, should cease to be exercised, except as to so much of the railways as should then be completed. And it was also by this act provided, that it should be lawful for plaintiffs from time to time to treat, contract, and agree with the said defendant, his heirs or assigns, for one or more lease or leases, and accordingly to accept and take from him or them one or more lease or

leases of all or any of the tolls authorised to be taken by the Pier Act.

On January 3rd, 1845, the chairman of the directors of the railway company wrote a letter to the defendant's solicitor containing the following passage:—"The directors of the Furness Railway Company being about to let the contract for the works, and the part of the line between Salt-house and Peel being unnecessary, unless Mr. Smith's pier is made, they must determine whether to include or omit that part in the present contract, and I am requested to communicate with you on the subject. The directors authorise me to say, that, if Mr. Smith will give the company a guarantee that his pier shall be made and perfected for the use of the public by the time this portion of the railway is completed, the company will give him a guarantee to construct immediately this part of the line, and will include it in the present contract. It will be necessary that such stipulations should be made as our engineer may advise to be necessary for the accommodation of the company as to stations and warehouses, so that the powers under our respective acts may not clash."

In answer to this communication, the defendant's solicitor, on the 7th of January, 1845, sent to the chairman of the railway company a letter containing the following passage: "I presume you intend that the company shall complete (and engage to complete) the whole of the railway and branches as described in their act of Parliament, including that part which lies between Pile and Salthouse, and not that they should engage to complete this part only. If I am correct in assuming this, Mr. Smith will engage with the company to complete his pier ready for public use within a reasonable time, to be defined upon the company entering into the like engagement with him in respect to their railway and works."

For the purpose of carrying out the above arrangements, a deed of covenant was executed, dated March 11th, 1845, and made between the directors of the Furness Railway

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Company of the one part, and the defendant of the other part, whereby the directors, acting for and on behalf of the company, covenanted with the defendant, his heirs and assigns, that the railway company would, on or before the 31st day of December then ensuing, make and construct, and completely finish, fit for use and occupation, the line of the Furness Railway for the proposed pier, and also certain branch railways therein specified, and shewn in the plan signed by the several parties thereto; and in consideration of the above covenant the defendant covenanted with the directors of the railway company, their heirs, executors, and administrators, that the defendant would, on or before the 31st day of December, build, erect, and finish the pier, agreeably to and in conformity with the plans and sections, which had been deposited with, and had been allowed and approved of, by the Lords of the Admiralty.

In August, 1846, a steam packet was established for the purpose of conveying passengers and goods from Fleetwood to the pier, and plied from the said month of August, until the middle of October, 1846. Large numbers of passengers were landed and shipped at the pier upon and from the said steam packet, and the whole of such passengers, with very few exceptions, were conveyed along the railway. The defendant permitted these passengers to be landed upon and shipped from the said pier, and permitted the said plaintiffs to use the pier with their carriages and engines without demanding or receiving any toll.

On May 11th, 1847, another act was passed for extending and enlarging the pier, and to alter the former act; and it was thereby made lawful for the defendant, his heirs and assigns, by himself and others, at his and their own proper costs and expenses, to construct an additional pier or piers, jetty or jetties, on the north and east sides of Roe Island into the harbour of Pile, and an additional pier, stage, or jetty on the south side of the pier.

The present suit was instituted against Mr. Smith by the company, who in their bill stated, that, in the expecta-

tion that steam communication between Fleetwood aforesaid and the pier would be re-established in the present summer, and that, upon the faith of the above agreement, all persons desirous of using said Rampside Branch would be permitted to embark and disembark, and to land and ship goods upon and from the said pier, the plaintiffs had expended large sums of money, amounting in the whole to upwards of £3000, in laying down an additional line of railway, and that the principal purpose for which said railway was constructed was the conveyance of the mineral produce of the district of Furness, and that such mineral produce was conveyed along the railway and was shipped at the port of Barrow. The bill then stated, that the defendant refused to permit the pier to be used on payment of the statutory tolls, and insisted upon terms which the plaintiffs declined as being unreasonable. The prayer was, that the agreement contained in the indenture of March 11th, 1845, might be decreed to be specifically performed, and that, if necessary for the purposes of such specific performance, the defendant might be decreed to obtain the certificate mentioned in the 105th section of the Pier Act, and to obtain in manner required by the 131st section of the said act such lists of tolls as are thereby required; and that the defendant might be decreed to permit the plaintiffs, their agents and servants, with or without carriages and engines, and also all other persons desirous of being conveyed, or who have been conveyed, or who are desirous of unloading goods intended to be conveyed, or of shipping goods which have been conveyed along plaintiffs' said railway, to use the said pier in such manner as may be necessary and proper, upon payment of such tolls as may be legally demanded by said defendant under said act, and that in the meantime the defendant, his servants and workmen, might be restrained from preventing or interfering with the use of the pier by the plaintiffs, their agents and servants, either with or without carriages and engines, and also from preventing or interfering with the use of the said pier by any person or persons desirous of

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being conveyed, or who had been conveyed, or who were desirous of unloading goods intended to be conveyed, or of shipping goods which had been conveyed along the railway, the plaintiffs and such person or persons as aforesaid paying such tolls as might be legally demanded by the said defendant under the Pier Act.

The plaintiffs now moved upon notice for an injunction in the terms of the prayer of the bill, upon affidavits in support of its statements.

In opposition to the motion the defendant by his affidavit deposed, that he had completed the pier in conformity with the plans and sections which were deposited with the Lords of the Admiralty in pursuance of the first act, and which were allowed and approved of by them, in conformity with the deed of covenant between the plaintiffs and the defendant, but that the defendant was advised and believed that the same was not in such a state as would enable passengers to embark or disembark thereat without great risk and danger of their lives, and danger to the pier and any vessel to be employed for such embarking and disembarking, except only at the end of the pier in Pikeston Bed Hollow for a period of an hour and a half or thereabouts before and after low water, and that the defendant was further advised and believed that goods could not be safely landed from a ship upon the pier without danger to the pier and any vessel to be employed therein, except at such place and at such period as aforesaid.

The defendant stated, that he did freely and voluntarily permit the public, and not the plaintiffs merely, to use the pier and the railway thereon for a period of two months or thereabouts, between the months of August and October, 1846, but without taking or demanding any tolls or other charges for the use of the same, and that in consequence of the information and advice which the defendant received in respect of the danger and inconvenience resulting from the use of the pier at any other part than the end thereof in Pikeston Bed Hollow, at such period as aforesaid, he had taken the necessary measures for enabling him to construct

such additional pier or jetty as would provide for safely landing and embarking passengers at the pier during such periods as they could not then be landed or embarked at the end thereof in Pikeston Bed Hollow aforesaid, and that he intended to postpone the application to any chairman of quarter sessions for the peace of the county of Lancaster, for such certificate as was mentioned in the 105th section of the first act, until such additional pier or jetty should be completed. The defendant further stated, that, since the act of Parliament for enabling him to construct such additional pier or jetty had been passed, he had caused a plan of the same to be prepared and to be submitted to the Lords of the Admiralty for their sanction and approval, and that he had caused contracts to be entered into for the wood and ironwork which would be required for the same, and that he intended to proceed to complete the pier or jetty so soon as he received the sanction of the Lords of the Admiralty.

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Mr. *Kenyon Parker* and Mr. *Currey*, in support of the motion.—Although there is no express stipulation as to opening the pier for public traffic, this must have been implied. Of what use to the plaintiffs would the completion of the pier have been, and what inducement could it have afforded to the immediate construction of the branch railway, unless the pier was opened for traffic, at all events as concerned the passengers and goods carried by the railway? According to the terms of the Pier Act, as soon as the pier is completed the defendant is entitled to demand certain tolls, and the public must have a right to use it on payment of such tolls. Although the pier need not have been completed for some years to come, it is, in consequence of the agreement, now finished. It was not necessary to carry the stipulations any further, the act of Parliament coming into operation whenever the pier was completed. [The *Vice-Chancellor*.—Must I not, before I interfere, see

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a case of irreparable or very substantial mischief with a reasonably probable right to a decree at the hearing, if the case made by the affidavits shall be then sustained?] We submit that both these cases are made out; the title to a decree by the arguments which we have submitted, and the case of irreparable mischief by the circumstance that the damage is incapable of being calculated.

Mr. *Russell* and Mr. *Craig*, for the defendant.—The pier is not yet complete according to the terms of the act, as amended by the new act, and although the defendant opened it last year, that was mere gratuitous liberality on his part, for no tolls were taken. There is, at all events, at present, no statutory right to use the pier, nor is there any pretence for importing into the agreement a stipulation for opening the pier. No doubt each party expected that the interest of both would lead, as they probably will ultimately lead, to a further agreement as to the terms on which the defendant is to permit his pier to be used before the statutory period, and as to the railway bringing trains down to the pier. The existing agreement is silent on both points, which shews that a further contract was contemplated, when this should have been performed, for of course the defendant would not have contracted to incur the extra expense of finishing and opening his pier before the statutory period, unless the railway company on their part entered into some agreement as to running their trains to the pier. The utmost extent to which the Court has gone, has been to enforce quiet enjoyment of an easement where the legal right has been established; whereas, here, the plaintiffs ask the Court to interfere on an interlocutory application, in a way in which it would not interfere even at the hearing, without the right being first established at law. Nor is any case made out of irreparable mischief, as there is where a party seeks to be protected in the enjoyment of his own land, for the disturbance in which damages cannot compensate him.

Mr. *K. Parker*, in reply.

The VICE-CHANCELLOR :—

What I might have done had this case come before me on an information or on a bill and information, it is not necessary for me to say, nor am I sure; but as the case stands, I am of opinion that the Court ought not to interfere in favour of the plaintiffs. I am unable to view the damage apprehended as irreparable, or as not susceptible of pecuniary compensation, if the plaintiffs make out their title to it. Nor is it manifest to my mind, that, if the case alleged were established at the hearing, there must be a decree to the extent sought by this motion or any extent covered by it. I refuse the motion, though unwillingly, but without prejudice to any question in the cause, and I reserve the costs.

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FELTHAM v. CLARK.

May 3.

MESSRS. Feltham & Cooper, bill brokers, agreed, in 1839, with Mr. John Clark, to discount bills of exchange for him, in the usual course of business, upon receiving security from him for balances to become due to them, and Mr. Clark accordingly, on the 17th of December, 1839, deposited the title-deeds of a house, No. 62, Paradise-street,

The owner of a vessel made a mortgage of it and of the cargo, in London, to A., whilst the vessel was on a whaling voyage to the South Seas, subject

to two prior mortgages thereof, and the third mortgagee forthwith gave notice of his mortgage to the two prior incumbrancers. The master of the vessel afterwards, putting into Sidney, transhipped the oil taken in the voyage to another vessel, consigned to consignees in London, who honoured his bill of exchange on them upon having a lien on the consignment. The mortgagor induced B. to advance him £1000 on a mortgage of the cargo so transhipped and consigned, without notice of any other charge thereon, except the lien of the consignee. B. gave notice of his mortgage to the consignee. A., as soon as he knew of the consignment, (but subsequent to B.'s notice), gave notice to the consignee of the mortgage to him; and after such notice the consignee, after satisfying his own lien, paid over the balance of the proceeds of the oil to B. :—*Held*, that A., having done all he could do towards possession, was entitled to priority over B.

Where it appeared, by a statement in an answer, that C., who was not a party to the suit, had an interest in the subject-matter of the suit, but the objection on account of C.'s absence was not taken by any of the answers :—*Held*, that this was a case within the 40th of the General Orders of August, 1841, and the Court made a decree in the suit saving the rights of C.

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Rotherhithe, with them, with a memorandum of deposit and agreement to mortgage the premises to them, for any balance due to them upon such bills of exchange as they might discount for him.

Between 1839 and 1843, Messrs. Feltham & Cooper discounted many bills for Mr. Clark, and on the 27th of October, 1843, a sum of 238*l.* 9*s.* 6*d.* was due, as the balance of account from Mr. Clark to them.

In October, 1843, Mr. Clark was the sole owner of a ship called *The Emmeline*, of the port of London, then being in the South Seas, engaged in the whale fishery, subject to a mortgage thereof created by an indenture, dated the 6th of October, 1842, to Messrs. Currie, Raikes, & Co., bankers, and also subject to another mortgage created by an indenture, dated the 13th of January, 1843, to Mr. Thomas Benson.

By an indenture, dated the 27th of October, 1843, Mr. Clark assigned the said ship, called *The Emmeline*, then in the South Sea whale fishery, and all the blubber-oil and head-matter and other cargo then caught or procured, or which might thereafter be caught, procured, or brought upon, out of, or in the said ship, on its then present or any then future voyages or expeditions, to Messrs. Feltham & Cooper, subject to the said two several mortgages of the ship, and subject to a proviso in the same indenture of the 27th of October, 1843, contained for re-assignment, upon payment, by Clark to Feltham & Cooper, of the said sum of 238*l.* 9*s.* 6*d.*, and interest, on the 20th of January then next.

On the 30th of December, 1843, Messrs. Feltham & Cooper gave notice to Messrs. Currie, Raikes, & Co., and also to Mr. Thomas Benson, the prior mortgagees, of their mortgage, and of its material contents.

At the time of the date of the mortgage to Messrs. Feltham & Cooper, the ship *Emmeline* had been sent out on a whale-fishing voyage, to obtain a cargo of oil and head-

matter and whalebone, and to bring the same to the port of London. John Rains, the master in charge of the ship and its crew, during the voyage, and before the 27th of October, 1843, the date of the execution of the mortgage to Messrs. Feltham & Cooper, captured many whales, and procured a large quantity of blubber-oil and head-matter.

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The master, having taken the ship into the port of Sidney, in New South Wales, to repair and refit, agreed with Messrs. Griffiths, Gore, & Co., who were correspondents of Messrs. John Gore & Co., London, to raise £1661 upon a lien on the cargo of the Emmeline. And accordingly Rains drew a bill of exchange, dated the 16th of December, 1843, upon Messrs. John Gore & Co., London, payable to the order of Messrs. Griffiths, Gore, & Co., for £1661, at sixty days after sight, and he transhipped the blubber and cargo of the Emmeline from that ship to the Clara, of which one Crow was the master, and Mr. Joseph Fletcher, of London, was owner, for the purpose of being consigned to Messrs. John Gore & Co., London, to be sold by them. The bill of lading of the transhipped cargo was made out and given to Rains, who indorsed the same to the order of Messrs. Griffiths, Gore, & Co. And the bill of exchange and bill of lading having been both indorsed by Messrs. Griffiths, Gore, & Co., and handed to the Union Bank of Australia, at Sidney, the Bank gave Rains cash for the bill, less discount and commission.

Messrs. John Gore & Co., having been duly advised by Messrs. Griffiths, Gore, & Co., of the bill on them, accepted the same, on its being presented to them, on the 22nd of April, 1844, and on the 14th of May following, they duly paid the amount, and thereupon the Union Bank handed the bill of lading to them.

Rains, the master of the Emmeline, by letter, authorised Messrs. John Gore & Co. to pay over the surplus of the proceeds of the sale of the transhipped cargo, less expenses, to Mr. John Clark.

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Messrs. John Gore & Co. had no notice until after they had accepted the bill for £1661, that any person, except Mr. John Clark, had any interest in or lien on the proceeds of the cargo consigned to them.

Mr. John Clark, having been informed by Messrs. John Gore & Co. of the transaction, represented to Mr. Dowers that he, Clark, was entitled to the cargo of oil, subject only to the lien of Messrs. John Gore & Co. for £1661 thereon, and induced Mr. Dowers to advance to him £1000 on security of the cargo. Mr. Dowers accordingly advanced the £1000 to Clark, and, by indenture, dated the 11th of May, 1844, Clark assigned the cargo, subject to the lien for £1661 thereon, to Mr. Dowers, as security to him for the £1000 and interest. On the 13th of May, 1844, Mr. Dowers gave Messrs. John Gore & Co. notice of this mortgage to him. Up to and after the 13th of May, 1844, neither Mr. Dowers nor Messrs. John Gore & Co. had any notice whatever of the mortgage of the 27th of October, 1843, to Messrs. Feltham & Cooper.

About the 24th of May, 1844, Messrs. Feltham & Cooper had some intimation that the transhipment above mentioned had been made; but, until that date, they had believed that the cargo of the *Emmeline* had been kept on board that ship, and that she had, since 1843, been employed in completing her cargo.

On the 24th of May, 1844, Messrs. Feltham & Cooper served a notice on Mr. Fletcher, the owner of the *Clara*, stating the material contents of the said indenture of the 27th of October, 1843, and that they had been informed that the cargo of the *Clara* had been transhipped from the *Emmeline*, and claiming the possession of the cargo so transhipped, subject to the mortgages to Messrs. Currie, Raikes, & Co., and to Mr. Benson.

The *Clara* arrived in the London Docks in the month of July, 1844, and, on the 11th and 12th of that month, Messrs. Feltham & Cooper, having discovered that Messrs.

John Gore & Co. were consignees of the cargo of the Clara, gave to them, and to Crow, the master of the Clara, notice of their claim on the cargo.

On the 23rd of July, 1843, the cargo of the Clara was being discharged in the London Docks, and Messrs. Feltham & Cooper gave a similar notice to the secretary of the London Dock Company.

On the 11th of September, 1844, Messrs. Feltham & Cooper gave notice to Mr. Dowers of the deed of the 27th of October, 1843, and of their claim to the proceeds of the cargo of oil in the Clara, subject to the lien of Messrs. John Gore & Co. thereon, and to the mortgages to Messrs. Currie, Raikes, & Co., and Mr. Benson.

The oil realised £2900. Messrs. Gore's claim thereon amounted to £1700, and they paid the balance of the proceeds, viz. £1200, to Mr. Dowers, justifying their doing so on the ground that Mr. Dowers' notice to them of his charge was prior in point of date to Messrs. Feltham & Cooper's notice to them. Out of this sum of £1200 Dowers paid £500 to Benson, and retained the balance in part discharge of the mortgage for £1000 to himself.

Under the above circumstances, Messrs. Feltham & Cooper filed their bill against Clark, the mortgagor, and Rains, the master of the Emmeline, Messrs. John Gore & Co., and Dowers, stating the equitable mortgage of the house in Paradise-street, and that the debt of 238*l.* 9*s.* 6*d.* and interest was still due to them, and that the mortgage on the house was an inadequate security; and, after praying the ordinary relief as equitable mortgagees of the house, they prayed the Court to declare that they were mortgagees of the cargo transhipped into the Clara, and for an account in respect thereof from Messrs. John Gore & Co. and Dowers.

Messrs. Currie, Raikes, & Co. were not made parties to the suit, upon an allegation, acquiesced in by the defend-

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ants in their answers, that they had and claimed no interest in the cargo in question.

Benson was not made a party to the suit; but the bill charged that he had been paid part of the money due to him on his security, and that he had accepted £500 in satisfaction of all claim on the cargo, and had renounced all claim thereto. The defendant Dowers, in his answer, stated, that he had paid £500 to Benson as mortgagee, but did not admit that Benson's claim had been thereby satisfied. None of the answers, however, formally objected to the suit on the ground that Benson was not a party to it.

Mr. *Rolt* and Mr. *Shapter*, for the plaintiffs.—The plaintiffs took by their mortgage a charge on the ship *Emmeline* and its cargo prior to Dowers, and they did all that they could do to give effectual notice of their charge by the notice which they gave to the two prior mortgagees of the *Emmeline*; and although their notice to Messrs. Gore & Co. and to the owner of the *Clara* was posterior in point of date to the notice given by Dowers, they are not chargeable with negligence; because, as soon as they were informed that the oil on which they had a charge was shipped in the *Clara*, they gave notice to Messrs. John Gore & Co., the consignees of the *Clara*, and all other proper persons. The plaintiffs are willing to take a decree expressly subject to Benson's priority. The vessel being on a distant voyage, the plaintiffs had no power of giving the master notice of their charge.

They cited *Dearle v. Hall* (a), *Gardner v. Lachlan* (b), and *Langton v. Horton* (c).

Mr. *Russell* and Mr. *Cole*, for the defendant Dowers, objected to the bill for want of parties, and submitted that,

(a) 3 Russ. 1.

(b) 6 Sim. 407.

(c) 1 Hare, 549.

although the objection was not in express words taken by the answer, yet that it was competent for them at the bar to take it, upon the suggestion in the answer of Dowers, that Benson was not satisfied. The defendant Dowers' case was, that Messrs. John Gore & Co. had paid the balance in their hands to him by the direction of Benson, in consequence of a compromise with Benson, and that, in the absence of Benson, the rights between the parties could not be fully investigated or settled. They cited *Etty v. Bridges (a)*.

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Mr. *Gazelee*, for the defendants Messrs. John Gore & Co.—It is conceded that the legal title is in Messrs. Gore to pay themselves first. The surplus they paid to Dowers, who had given them the first notice of charge. They object to be exposed to the risk of another suit, to which they would be liable if a decree in the present suit be made saving Benson's rights.

The VICE-CHANCELLOR :—

The objection for want of Benson as a party to this suit, not having been taken by the answer, this case falls properly within the 40th of the Orders of August, 1841; by which the Court is empowered to make a decree saving the rights of absent parties, and I shall do so here.

The only question in this case is, I think, whether the plaintiffs could have done anything further towards possession than they have done.

They were not bound to send letters to meet the master wherever the vessel might possibly be; and it has not been shewn that the plaintiffs could reasonably have been expected to do any act which they have not done: *Lex neminem cogit ad vana seu inutilia peragenda*. The consequence is, that the plaintiffs have done nothing to forfeit or lose their priority over the defendant Dowers.

(a) 2 Y. & Coll. C. C. 486.

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As this is not a case in which Messrs. Gore paid the balance in their hands to the defendant Dowers, before they had notice of the plaintiffs' charge, it is unnecessary for me to decide what, under different circumstances, would have been the result. Messrs. Gore had notice of the plaintiffs' prior title before they transferred the balance of the proceeds to Mr. Dowers, and the plaintiffs' title is preferable to that of Dowers.

By the decree, the plaintiffs' security was declared to be prior to Dowers'; an account was directed of what was due to the plaintiffs on their security; Dowers was directed to pay into court 238*l.* 9*s.* 6*d.*, the balance due to plaintiffs, and secured by the deed of the 27th of October, 1843, within a month, plaintiffs undertaking to abide by what the Court might order in respect of the house and premises comprised in the equitable deposit of the 17th of December, 1839, to them.

The Decree was to be without prejudice to the rights (if any) of Benson.

May 24.

REES v. WILLIAMS.

A trustee having, under a settlement, a power of sale, with a trust for

BY indentures of lease and release, bearing date respectively the 29th and 30th days of April, 1803, the release interim investment in the funds or on real security, concurred in a sale, and permitted the tenant for life to receive the purchase-money, which was not invested according to the trust:—*Held*, that the *cestui que trust* has not the option of requiring the trustee to replace the purchase-money with interest, or to buy such a sum of stock as the proceeds of the sale would have purchased if invested at the time.

An allegation in the trustee's answer, that part of the purchase-money had been laid out by the tenant for life in the purchase of an estate, of which the plaintiff was in possession:—*Held* not to constitute a ground for directing, by the decree, an inquiry as to the fact, the matter being properly the subject of a cross suit.

Where an attesting witness to a deed had become blind,—*Held*, that it was not sufficient to prove the handwriting of the signature, but that he must be also examined.

being made between John Rees, since deceased, of the first part; Elias Vanderhorst and Ann Catherine Vanderhorst (his daughter), of the second part; John Vaughan (since deceased) and the defendant, of the third part; and Thomas Cooper Vanderhorst and Arthur Palmer, of the fourth part, (being the settlement made previously to the marriage of the said John Rees and Ann Catherine Vanderhorst); John Rees released unto the said John Vaughan and the defendant a messuage, tenement and lands, called Tyry Vann, otherwise Parhymilior, situate in the parish of Llangardeirne, in the county of Caermarthen, with the appurtenances, to the use of John Rees and his assigns, during his life, with remainder to the use of the said John Vaughan and the defendant and their heirs, during the life of the said John Rees, upon trust to preserve contingent remainders, and with remainder, after divers limitations, which had determined or failed, to the use of the first son of John Rees by Ann Catherine Vanderhorst in tail, with divers remainders over, and with an ultimate remainder to the use of John Rees, his heirs and assigns, for ever; and the settlement gave to the trustees the usual powers of sale and exchange; the clause for the interim and ultimate investment of the proceeds of sale providing that those proceeds should, with all convenient speed, be laid out and disposed of by the defendant and his co-trustee, or the survivor of them, or the heirs, executors, or administrators of such survivor, with the consent and approbation of John Rees and his intended wife, and should be invested in the purchase of other freehold messuages, lands, tenements, hereditaments, and premises in fee-simple in possession, and of leasehold and copyhold messuages, lands, tenements, and hereditaments, which might be contiguous thereto, and be convenient to be purchased therewith, to be situate, lying, and being or arising in England or Wales, of equal or greater value than the hereditaments and premises which should have been so sold or conveyed as aforesaid, and as well the messuages,

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farms, lands, tenements, and hereditaments so to be purchased, as those to be taken in exchange as aforesaid, should be settled, conveyed, and assured to such and the same uses, intents, and purposes, and under and subject to such and the same powers, provisos, restrictions, limitations, declarations and agreements as were in and by the said now stating indenture mentioned, expressed, and declared of and concerning the said hereditaments and premises thereinbefore made saleable and exchangeable, or as near thereto as the death of the parties and other contingencies would admit of; and it was thereby further declared and agreed, that, in the meantime, and until the money arising by such sale or sales as aforesaid should be invested in a purchase or purchases as aforesaid, it should and might be lawful to and for the defendant and his co-trustee, or the survivor of them, and the executors or administrators of such survivor, by and with the consent and approbation of John Rees and his intended wife, or the survivor of them, and if they should be both then dead, then at the discretion and by the proper authority of the defendant and his co-trustee, or the survivor of them, or the executors or administrators of such survivor, to place such sum or sums of money at interest in their or his names or name, either in the public stocks or funds, or in Government or upon real securities, and also with such consent and approbation as aforesaid, or of their or his own proper authority, as the case should happen, from time to time to call in the principal money so as aforesaid placed out, and to place out the monies thereby arising in or upon such new or other stocks, funds, or securities of the same, or the like nature, as they should think proper, and the interest, dividends, and annual produce arising from such stocks, funds, and securities, until such purchase or purchases should be made as aforesaid, or from any other sum or sums of money which should arise or come to the hands of the said trustees or trustee for the time being of, and by any alteration or transposition of such securities or

funds as aforesaid, should go and be paid and applied to such person or persons, and to and for such uses, intents, and purposes, and in such manner as the rents and profits of the said hereditaments and premises so as aforesaid therein-before directed to be purchased, would go and be payable or applicable, in case such purchase or purchases was or were actually made.

It appeared that, in and previously to the year 1807, the defendant carried on the business of an attorney and solicitor at Caermarthen, and was employed by John Rees as his solicitor; and that in February, 1807, a messuage and lands, called "Tyry Vann," otherwise Parhymilior, comprised in the settlement, with the appurtenances, were put up for auction, and sold for £1205, and that the defendant was a party to and executed the conveyance of the premises to the purchaser, and that he also signed a receipt for the purchase-money, which was indorsed on the deed of conveyance, but that he did not invest any part of the proceeds of the sale in the purchase of other messuages, lands, tenements, or hereditaments in England or Wales, or place any part out at interest in the public stocks or funds, or in Government or upon real securities.

John Rees died in May, 1843.

The plaintiff, who was his eldest son and tenant in tail under the settlement, sought, by the present suit, to have it declared that the defendant was answerable for the amount of the purchase-money, and that he might be decreed to make good so much money as would be sufficient to purchase such a sum of £3 per Cent. Consolidated Bank Annuities as the amount of such purchase-money would have purchased at the time the same was received; and the bill prayed that, for that purpose, an inquiry might be directed to ascertain what sum of £3 per Cent. Consolidated Bank Annuities might have been purchased with the amount of such purchase-money at the time aforesaid, and that the defendant might be ordered and decreed to pay to

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the plaintiff a sum of money equal to the amount of the interest which would have accrued since the decease of John Rees on such a sum of £3 per Cent. Consolidated Bank Annuities as the clear purchase-money would have purchased when the same was received by the defendant.

The defendant, by his answer, said he was wholly unable to remember whether it was he who made any such sale as was alleged in the bill, but believed that it was not, as he had searched among his papers and found none relating to any such transaction. He denied that he had ever received the purchase-money, and admitted that he had not invested any part of it. And he denied that he had applied the whole or any part of the purchase-money to his own use, or had in any other manner misappropriated or misapplied the same, or any part thereof. He said he had recently heard, and that he believed, that John Rees had, without his knowledge, and without his being apprised of it in any way at the time, at some period in or about the month of February, 1807, disposed of the farm and lands in question to one Daniel Gelly, who was the tenant in possession of the farm. He further stated, that he had been informed, and verily believed it to be true, that John Rees in his lifetime, with some part of the monies arising from the sale of some of the trust-estates, purchased a tenement, farm, and hereditaments adjoining and immediately contiguous to the said demesne of Kilymdenchoyd, of considerable value, of and from the late John Colly, Esq., of Ffynnone, in the county of Pembroke, deceased, and that the said farm and hereditaments so purchased by the said John Rees were now in the possession of the plaintiff, or his under-tenants or assigns.

Mr. *Wigram* and Mr. *Rasch*, for the plaintiff, contended, that the plaintiff was entitled to have a sum of stock purchased, as prayed by the bill, on the principle that the Court will put a *cestui que trust* against whom a breach of trust has

been committed, in the same position, as near as it is possible, as if there had been no breach of trust; and in case of doubt as to what that position would have been in fact, will give him the option of saying what is most to his advantage. The authorities are conflicting. In *Hockley v. Bantock* (a), Lord Gifford, Master of the Rolls, charged defaulting trustees with the stock which the trust-money would have purchased at the option of the *cestui que trust*. In *Watts v. Girdlestone* (b), and *Ames v. Parkinson* (c), the present Master of the Rolls followed the decision in *Hockley v. Bantock*.

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It is admitted, however, that, in *Marsh v. Hunter* (d), Sir John Leach decided otherwise; and in *Shepherd v. Mouls* (e), the Vice-Chancellor Wigram was of opinion, that defaulting trustees were answerable only for the trust-money with interest, agreeing with *Marsh v. Hunter*, and dissenting from *Hockley v. Bantock* and *Watts v. Girdlestone*. In *Aulds v. Anstruther* (f), however, the same question again arose, when *Shepherd v. Mouls* was cited, but the Master of the Rolls adhered to his former decision.—They also cited *O'Brien v. O'Brien* (g).

Mr. Russell and Mr. Stinton, for the defendant, submitted to pay the amount of the purchase-money, with interest from the death of the tenant for life, and were proceeding to contend that he was not liable for more; but they were stopped by the Court.

The VICE-CHANCELLOR :—

I have, on a former occasion, in a case similar to the present, declined to decide that a trustee in default is liable to be charged with the amount of stock which might have been purchased with unappropriated trust-mones.

(a) 1 Russ. 141.

(b) 6 Bea. 188.

(c) 7 Id. 379.

(d) 6 Mad. 295.

(e) 4 Hare, 500.

(f) At the Rolls, March 8, 1847.

(g) 1 Mol. 533.

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In the present case, the trust is not to invest in stock only, but on real security or stock, and the defendant must be charged with the amount in money which the sales produced, with interest from the death of the tenant for life; the trustee preferring that course.

Mr. *Russell* and Mr. *Stinton* asked for an inquiry (founded on the allegations in the answer) before the Master, whether any portion of the proceeds of the sale had been received by the plaintiff's father, and had been invested in the purchase of lands which had devolved on the plaintiff; but

The VICE-CHANCELLOR declined to direct any reference on the subject, considering that any relief in respect of such a transaction should form the subject of a separate suit.

In proof of the execution of the deed of conveyance by the trustee, and his signature to the receipt for the purchase-money thereon indorsed, the deposition in the cause of a witness to the handwriting of the signatures of the defendant and of the two attesting witnesses to the execution and receipt, and evidence of the death of one of the witnesses, and that the surviving witness was blind, were tendered.

The VICE-CHANCELLOR declined to receive the documents on this evidence, without the examination of the blind man (*a*).

The defendant, in order that the cause should not stand over to complete the evidence, admitted that the deed had come out of the proper custody, and the deed was, upon this admission, received as an old deed requiring no proof.

(*a*) See *Crank v. Frith*, 2 Moo. & R. 262; S. C., 9 Car. & P. 197; contra, *Wood v. Drury*, 1 Lord Raymond, 734; and *Pedler v. Paige*, 1 Moo. & R. 258, both of which were cited in *Crank v. Frith*.

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June 1.

ANONYMOUS.

A BILL having been filed, one of the defendants to it, against whom no relief was sought by the bill, had been served with a copy of the bill under the 23rd Order of the 26th of August, 1841.

The bill was afterwards amended, but no copy of the bill, as amended, was served on that defendant.

A decree was afterwards obtained in the suit.

An objection to drawing up the decree was raised in the registrar's office, on the ground that, under the same Order, it was incumbent on the plaintiff to serve a copy of the amended bill.

Mr. *Wigram* now asked the Court, under the above circumstances, to order the decree to be drawn up.

The VICE-CHANCELLOR declined to make the order as asked. His Honor said: This defendant may not have wished to answer the original bill, and might have desired to answer the bill in its amended form; he should have had an opportunity to do so.

DUKE OF BEAUFORT v. PHILLIPS.

May 31 &
June 3.

ON the 11th of November, 1840, the plaintiffs filed their original bill against Richard Mansel Phillips, for a specific performance of a contract entered into in the year 1837 by R. M. Phillips, for the purchase, by him, of certain freehold property for £225.

On March 3rd, 1843, the cause came on, and a decree was pronounced, whereby it was ordered that the contract should be specifically performed and carried into execution by the defendant; and the defendant, by his counsel, ac-

Decree for specific performance, with references to the Master to compute interest and tax costs, and ordering defendant to pay purchase-money and interest and costs when ascertained:—*Held*, to constitute a judgment debt.

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cepting the title, it was referred to the Master in rotation to compute interest at the rate of £5 per cent. per annum on the said sum of 202*l.* 10*s.*, from the 26th day of September, 1838. And it was ordered that the said defendant should abide by the first of the conditions of the said sale, as to executing a counterpart of the conveyance of the said hereditaments and premises; and upon plaintiffs executing and delivering to the defendant, at the expense of the defendant, according to the said contract and conditions of sale, a proper conveyance of the said hereditaments and premises comprised in the said lot No. 58 in the pleadings mentioned, such conveyance to be settled by the Master in case the parties differed, it was ordered that the defendant should pay to the plaintiffs what should be found due to the plaintiffs on the account hereinbefore directed and executed, and deliver to the plaintiffs a counterpart of the said conveyance, according to the terms in the first of such conditions mentioned. And it was ordered that it should be referred to the taxing Master in rotation to tax the plaintiffs their costs of the said suit up to the time of the said decree, and certify the amount thereof; and that such costs, when taxed, should be paid by the defendant to the plaintiffs.

Some difference arose between the parties with respect to the conveyance, and, in September, 1844, before the conveyance was settled, and before any proceedings were had in the Master's office, and before any part of the purchase-money, interest, or costs had been paid to the plaintiffs, Richard Mansel Phillips died intestate, and letters of administration of his estate and effects were granted to his widow, one of the defendants.

The plaintiffs then filed a bill of revivor and supplement against the administratrix and heir-at-law of the original defendant, praying, among other things, that if it should appear by the admission of the defendants or otherwise, that there were no personal assets of the intestate applicable for the performance of the original decree, and the administratrix

should not elect to take the property, paying and performing what, according to the original decree, ought to be paid and performed, then that it might be declared that the plaintiffs had a lien on the premises for the amount of the purchase-money, interest, and costs, and that the said hereditaments and premises might be resold under the direction of the Court, and that all proper parties might concur therein, and might concur in all proper conveyances and assurances of the said hereditaments and premises; and that the money produced by such resale as aforesaid, might be applied, first, towards satisfaction of the said sum of 202*l.* 10*s.*, and interest and costs so due to the plaintiffs as aforesaid; and also in payment of their costs of the supplemental suit, and the expenses incident to such resale as aforesaid; and that the surplus (if any) of the said purchase-money might be paid to the administratrix, and that the plaintiffs might be declared entitled to stand as specialty creditors of the intestate, under the original decree for the deficiency (if any).

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Mr. *W. M. James* appeared for the plaintiffs.

Mr. *Rasch*, for the defendants.—The contract was only under hand, and could not of itself constitute a specialty debt. The decree against the original defendant was not final, and therefore gave no title to precedence: *Williams on Executors*, 805. In *Smith v. Eyles* (a), the Lord Chancellor said—"It is allowed that if a decree is obtained against a testator or his executor *quod computet*, it can be by no means put upon an equality with a judgment confessed after such decree. A decree *quod computet* always concludes in the same manner, and yet does not vary at all as to the executor; for before a final decree the executor may confess a judgment, and does not at all alter the nature

(a) 2 Atk. 385.

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of the demand, notwithstanding the words are inserted in the decree 'that each party do pay,' for these words are only a direction to the Master to insert what shall appear to be due upon the balance to either party, and when the order is made absolute, the money is to be paid to the person reported to be entitled." These observations apply to the order here, since it is not final, and does not direct the payment of any specific sum of money. The only question is, whether the 1 & 2 Vict. c. 110, s. 18, giving to decrees and orders in equity the effect of judgments, has made any difference; for, independently of the statute, the case is settled by the authority of *Rome v. Young* (a), where the plaintiff was only declared to be a simple-contract creditor, under circumstances exactly similar to those of the present case. Now, the 13th section of the 1 & 2 Vict. c. 110, provides, "that as regards purchasers, mortgagees, or creditors who shall have become such before the time appointed for the commencement of this act, such judgment shall not affect lands, tenements, or hereditaments, otherwise than as the same would have been affected by such judgment if this act had not passed." And the time at which the act came into operation was October 1st, 1838. It does not, therefore, seem to affect the present case, in which the purchaser became such in 1837, and the account directed commenced in September, 1838. But, even if the act could apply in point of time, its provisions are not applicable to such a case, for the 19th section provides that real estate shall not be affected by a decree otherwise than it was before the act, unless certain particulars are registered, and among them the amount of the monies ordered to be paid. This objection was held by the Court of Queen's Bench in *Jones v. Williams* (b) to be conclusive against issuing an execution under the act for money payable under an agreement of reference, which was made a rule of Court: and Lord *Denman* said—

(a) 4 Y. & C. Ex. 204.

(b) 11 Ad. & E. 175.

“The difficulty that presents itself is, that there is no definite sum of money expressed to be payable by the rule itself. These rules are to have the effect of judgments which are to charge the land, and, therefore, the sum to be so charged ought to be distinctly stated in the document which so charges the land, so that purchasers or creditors may know what it is. Judgments are to bind the land from the time directed by law. But, when rules like this are made, they also ought to bind the land at the time they are entered; but, at that time, there is nothing to inform anybody of the charge; the amount may not be ascertained for a year afterwards.” The forms of the writs of execution in Chancery under the act, all contemplate the case of a definite sum having been directed to be paid by the orders on which they are to be founded.

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The VICE-CHANCELLOR said that the decree in this case was of a higher nature than a mere judgment or decree *quod computet*. It was substantially an order to pay a definite sum and a final adjudication. It must be placed on the footing of a judgment, and the plaintiff must rank as a creditor accordingly for what should remain due after the proceeds of the estate were exhausted, for principal and interest, and for the costs incidental to making the lien on the property available, as in the case of a mortgage.

1847.

June 2.

SWAFFIELD v. ORTON.

A testator, after bequeathing to his daughter (a widow) an annuity, and directing his trustees to set apart a sufficient sum of stock to answer the growing payments, bequeathed his residuary personal estate to and to be equally divided between his grandson and granddaughter (by name) as tenants in common; but in case of the death of the granddaughter, under twenty-one and unmarried, in the lifetime of the grandson, or in case of the death of the grandson in the lifetime of the granddaughter, under twenty-one, he bequeathed the whole to the survivor; and, after directing payment,

during the minority of the grandchildren, for their maintenance, the testator directed that the clear surplus of the income of his residuary estate should accumulate in the hands of his executors, and be added to the principal of the share of his grandchildren in the residue, and directed that his grandchildren respectively should not be entitled to receive his or her share, or the accumulations, until after the death of their mother (the annuitant). The granddaughter married under age, and articles were executed on her marriage, whereby it was agreed, when she became entitled to the absolute and immediate possession of any part of the residuary estate, the same and all accumulations should be settled on certain trusts for the separate use of the wife for life, with subsequent trusts for the husband and children, and a proviso referring to and dependent on the trust for accumulation in the will. On a bill filed by the granddaughter, during her mother's lifetime, for a transfer of the fund:—*Held*, that the direction to accumulate in the will was precarious and ineffectual, and was not rendered otherwise by the settlement, and that the granddaughter's moiety became capital at her marriage, and that the accumulations since that period belonged to her for her separate use.

mon; but in case of the death of the said J. S. Orton before his attainment of the age of twenty-one years in the lifetime of the plaintiff, or in case of the death of the plaintiff before her attainment of the like age or marriage in the lifetime of J. S. Orton, then the testator gave and bequeathed the whole of his said residuary personal estate unto the survivor of his said grandchildren, his or her executors and administrators; and he directed his executors thereafter named to pay out of the interest, dividends, and income of the share of the plaintiff of and in his residuary personal estate, the sum of £100 yearly in the manner and for the purpose therein mentioned, during her minority, or until her marriage, before her attaining the age of twenty-one years; and he thereby made a similar provision of £200 a year for the said J. S. Orton during his minority; and the testator directed that the clear surplus of the interest, dividends, and income of his residuary personal estate should from time to time accumulate in the hands of his executors thereafter named, and be added to the principal of the share of his said grandchildren respectively therein, and laid out in the Government stocks or funds, or on real securities at interest, until the principal monies of his said residuary personal estate should become due and payable; and he directed that his said grandchildren, or either of them, should not be entitled to receive his or her share of and in his said residuary personal estate, and the accumulations thereon, until after their mother's decease.

The personal property of the testator consisted, at the time of his death, among other things, of £45,000 Consols, and £28,000 New 4 per Cents.

In August, 1826, the executors began to accumulate the surplus income of the residuary estate, after providing for the annuities given by the will to the testator's daughter and the maintenance of the grandchildren, and they continued to make such investments, without any division of the funds, until 1831, when the grandson attained his majority.

On October 19th, 1826, the plaintiff, who was then

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under the age of twenty-one years, intermarried with Robert Hassall Swaffield (a defendant); and, in contemplation of such marriage, an indenture dated the 18th of October, 1826, was executed; whereby, after reciting the will, it was expressed to be agreed, and the plaintiff, so far as she could or might, did direct, assent, and agree, and the said defendant R. H. Swaffield did covenant with the trustees, that, in case the then intended marriage should take effect, the said R. H. Swaffield, and the plaintiff respectively, and their respective heirs, executors, and administrators, should and would at any time or times after the plaintiff, her heirs, executors, or administrators, should have become entitled to the absolute and immediate possession and enjoyment of all or any part or parts of the several messuages, lands, and hereditaments under or by virtue of the said will of the said J. Swaffield, deceased, upon the request of the trustees or trustee for the time being of the settlement, execute such deeds as should be necessary or proper for settling and assuring (among other things) all such sum and sums of money and personal estate and effects whatsoever to which the plaintiff, her executors or administrators, then was, or should or might thereafter, or, if that settlement had not been made, would or might have become entitled to, or interested under, or by virtue of the said will of the said J. Swaffield, deceased, and all and every the stocks, funds, and securities, or fund and security upon which the same, or any part thereof, then was or thereafter should or might be placed out or invested, and all manner of dividends, interest, and annual and other proceeds, and other produce of the same, and all accumulations thereof, to the trustees or trustee of the settlement, on trust to pay the dividends to the plaintiff for her life for her separate use, without power of anticipation; and in the event of and after the death of the defendant R. H. Swaffield in the lifetime of the plaintiff, upon trust to permit the plaintiff or her assigns to receive and take the rents, interest, dividends, and annual proceeds to and for her and their own absolute use for the

then remainder of her natural life; and in the event of and from and after the decease of the plaintiff in the lifetime of the said defendant R. H. Swaffield, upon trust by and out of the interest, dividends, and proceeds of the said trust-monies, to raise and pay unto the said defendant R. H. Swaffield and his assigns thenceforth after death of the plaintiff, for the term of his natural life, one annuity or clear yearly sum of £800, and, subject thereto, to hold the same in trust for the children of the marriage, as the plaintiff should appoint; and, subject to such appointment, to stand seised and possessed of the trust-estates, monies, and premises, subject to the payment of the annuity of £800, or such other sum, to the said defendant R. H. Swaffield as aforesaid, upon trust for the child, if but one, or, if more than one, all and every other children of the plaintiff, either by the defendant R. H. Swaffield, or by any other husband or husbands, lawfully to be begotten, equally to be divided between them, if more than one, share and share alike, as tenants in common, and not as joint-tenants, and for his and their heirs, executors, administrators, and assigns respectively; and the settlement contained a proviso that, in case the plaintiff should die without leaving any child or children in the lifetime of her husband, and before the trust-monies thereby settled or agreed to be settled should become sufficient to produce an income fully equal to satisfy the said annuity of £800, after providing for the payment of a sum of £10,000 to J. S. Orton, in pursuance of a trust or limitation thereafter contained (and which said sum of £10,000 was to be a prior charge and have preference to the annuity), then the annuity was to be reduced and abated from time to time, according to the amount for the time being of the interest, dividends, and proceeds, after payment of the said sum of £10,000 to J. S. Orton, whatever the same might be, and such amount was to be the proper sum to be paid to the said R. H. Swaffield, in lieu of the annuity of £800, until the trust-funds should

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become adequate to pay and satisfy the whole of the same annuity, without any claim thereafter, in case the said interest, dividends, and proceeds should be increased, to recover or receive the amount of any former abatement of the annuity.

On the occasion of the settlement of 1826 being prepared, an opinion was taken as to the validity of the trust to accumulate the income of the residuary estate. The opinion was that the trust for the accumulation was good at least for the term of twenty-one years from the testator's death, if not wholly, as would be the case if Mrs. Orton came within the meaning of the words in the exception of the Thellusson Act (39 & 40 Geo. 3, c. 98, s. 2), "of any person taking an interest under the devise."

In 1831, on the occasion of Mr. J. S. Orton attaining his majority, a case was submitted on his behalf, as to the validity of the accumulation clause, to Mr. Pepya, (the present Lord Chancellor), whose opinion was to the effect, that, if the benefit of survivorship between the grandchildren referred to the possible event, of one of them not living to attain twenty-one, so that it would cease to have any operation upon the sons attaining twenty-one, the executors would be justified in paying to the son at twenty-one, and to the trustees of the granddaughter, their respective shares of the residue of the testator's property, there being, as it appeared, no other person interested in such shares; that it was, therefore, a case in which a testator had attempted to postpone the period of the legatee's enjoyment of the legacy without any gift over, in which case the legatee is entitled to possession before the time arrives; but that, if the survivorship applied to either grandchild dying before the mother, the executors could not do as they were requested, because the granddaughter was not competent to give up the chance of surviving to any portion of her brother's share.

In 1832, another opinion was taken, on the part of the ex-

ecutors, as to the validity of the trust for accumulation, and as to the course which the executors should pursue, pressed as they were then by the residuary legatees to transfer the fund. The opinion was, that the direction to accumulate was valid during the joint continuance of Mrs. Orton's life, and of the period of twenty-one years from the testator's death; but that if Mrs. Orton should survive the period of twenty-one years, the direction to accumulate would be void during the remainder of her life; that a court of equity would not at that time direct a transfer of the trust-funds to be made to the grandchildren; that it was the duty of the executors, so far as the trusts of the will were consistent with law, to carry them into execution, according to the intention of the testator, and that the executors could not properly and safely consent to an immediate division of the trust-funds; that, besides the objection of such a division being contrary to the express directions of the will, the children of Mrs. Swaffield (then Orton) would have a direct interest to insist on the accumulation of her share being continued as long as the law would permit.

The trustees continued to accumulate the surplus income of the personal estate, except that, on the imposition of the income-tax in 1842, they deducted, in equal moieties, from the income of the shares of the grandchildren, the sum necessary to discharge the tax on the annuity.

On the 17th May, 1846, the period of twenty-one years from the death of the testator expired. Mr. Orton immediately made application for a transfer of his share of the residuary estate; and Mr. and Mrs. Swaffield expressed their desire that her share should be transferred to the trustees of their marriage settlement; and on their desiring the indemnity of the Court, the present suit was instituted by Mrs. Swaffield by a next friend.

Mr. *J. V. Prior*, for the plaintiffs, contended that the

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trust for accumulation was bad, independently of the Thellusson Act, which he submitted had no application, and that this was established by *Saunders v. Vautier* (a) and *Josselyn v. Josselyn* (b).

Mr. *Wigram*, Mr. *Teed*, and Mr. *Rendall*, for the trustees of the settlement, cited *Curtis v. Iukin* (c), *Griffiths v. Vere* (d). They also contended that whatever might be the operation of the will alone, the settlement turned the accumulations into capital, and cited *Lewis v. Maddocks* (e).

Sir *F. Simpinson*, Mr. *Sandys*, and Mr. *John Bailly*, appeared for the other defendants.

The VICE-CHANCELLOR:—

The property in question in this cause is one moiety of the residue of the personal estate of the late Mr. John Swaffield, which is given by his will in such a manner as to vest absolutely in his two grandchildren as tenants in common in the event of their attaining twenty-one, or, as regards the granddaughter, marrying during her minority. But there is in the will a direction, precarious in its nature and wholly ineffectual, that during the life of the mother of the grandchildren, who is yet living, the income of their shares should accumulate in the hands of the executors. The granddaughter married, and articles were executed previously to her marriage, whereby it was agreed that all sums of money and personal estate to which the granddaughter was entitled under the will, and all accumulations thereof, should be settled in a given manner. It has been contended, that there is to be gathered from this settlement a manifestation of an intention that the precarious and ineffectual direction in the will to which I

(a) 4 Bea. 115; and 1 Cr. &
 Ph. 240.
 (b) 9 Sim. 63.

(c) 5 Bea. 147.
 (d) 9 Ves. 127.
 (e) 17 Ves. 48.

have alluded should be treated as binding and effectual. I look in vain through the settlement to find any such manifestation. I think it would be dangerous to impute to the parties, from such language as this settlement contains, any such intention. My opinion is, that the settlement should not be so construed; and if it be not so construed, I must treat the clause in the will as precarious and ineffectual, and hold that all accumulations as to the granddaughter's share ceased from the moment of the marriage. There must be a declaration that all the income arising after the marriage from the plaintiff's moiety, as it stood at the time of the marriage, belongs to her for her separate use.

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HEWETT v. SNARE.

June 3.

ROBERT SNARE, the testator in the cause, by his will, after bequeathing a legacy of £50, if and when the legatee attained the age of 21 years, bequeathed as follows:—"I bequeath unto my dear wife, Jane Snare, all my household furniture, plate, clothes, linen, china, jewels, trinkets, printed books, paintings, and prints in my dwelling-house in Castle-street, Reading, and all my shares and property in the Reading Gas Light and Reading Insurance Company, and also all book and other debts owing to me at the time of my decease, for her own absolute use and benefit, subject to and charged with the payment of the said legacy of £50 (if it should become payable), and also of all my just debts and funeral and testamentary expenses." The will then proceeded to devise and bequeath to the testator's nephew, his heirs, executors, and administrators, several specified freehold and leasehold tenements, and "all other" the testator's "real and chattel-real estate whatsoever and wheresoever," upon trust to pay the rents and profits to the testator's widow for her life, and after her decease on trust to sell and

A testator bequeaths specific chattels charged with the payment of a pecuniary legacy and of all the testator's just debts and funeral and testamentary expenses, and he bequeaths other specific and pecuniary legacies, but makes no residuary bequest:—*Held*, that, notwithstanding the charge, the general undisposed of residue, was first applicable.

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to divide the proceeds among the testator's four nephews and nieces therein named, but there was no disposition of the general residue.

Mr. *Russell* and Mr. *Randall*, for the plaintiffs.—As the whole personal estate is, by operation of law and without any express direction, charged with the testator's debts and funeral and testamentary expenses, the charge here can have no meaning except it be construed as evidence of an intention that the widow should take the articles specifically bequeathed to her, subject at all events to the charge. If it be construed as a charge only in the event of the general residue being insufficient, the words will be inoperative. In *Choat v. Yeats* (a) the testatrix gave the residue of her funded property, after payment of her just debts, legacies, funeral and testamentary expenses, to the plaintiff, who contended, as the defendant will here, that the general residue must be first applied, but the Court held that the specific bequest of the funded property was primarily liable. So in *Browne v. Groombridge* (b), the testator bequeathed to trustees Exchequer bills and other specific chattels, upon trust thereout, in the first place, to pay a pecuniary legacy, and then to pay his debts, funeral and testamentary expenses, and afterwards certain legacies, and the Vice-Chancellor held that the general residue was exonerated. [The *Vice-Chancellor*.—In both those cases there was a residuary bequest. In the present case the words of this will will not be inoperative if they are construed as charging the property bequeathed to the widow, in preference to the other specific legacies, but not in preference to the undisposed-of residue.]

Mr. *Teed* and Mr. *Shapter*, for the widow, referred to *Bootle v. Blundell* (c).

(a) 1 Jac. & W. 102. (b) 4 Madd. 495. (c) 1 Mer. 193, 231.

Mr. *Russell*, in reply.

The VICE-CHANCELLOR was of opinion that there was not a sufficient indication of an intention to exonerate the residuary estate.

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RICKETTS v. BELL.

June 9, 11, &
24.

BY an indenture of lease, dated August 19th, 1807, and made between Adam Mansfelds de Cardonnel Lawson, of the one part, and Matthew Bell, Robert Bell, Henry Bell, Thomas Robson, and John Watson, of the other part, Mr. Lawson demised unto M. Bell, R. Bell, H. Bell, T. Robson, and J. Watson, their executors, administrators, and assigns, full and free liberty, power and authority, by themselves, their agents, servants and workmen, at all times thereafter, during the term of years thereby granted, to enter into and upon all or any of the several pieces of copyhold ground therein described, and then and there to sink one or two pit or pits, as occasion might require, for the purpose of mining and working the coals in the township of Chirton; and to make and erect engines and machines, and all other things fit and proper for the purpose of mining and working the said colliery or coal mines, with sufficient and convenient heap-room and pit-room, and also full and free liberty within the limits therein mentioned to make, fix, lay, and place one main waggon-way, and bye-way, or side-way, and to have free liberty of way-leave and passage, for conveying

Lessees of way-leaves under a lease granted by a copyhold tenant in fee of the land entered into a negotiation for a new lease with the tenant for life under the lessor's will, which gave the tenant for life power of leasing. A correspondence ensued, in the course of which the tenant for life offered to grant a new lease at a certain rent, which offer was accepted by the lessees. The original lease contained a clause usual, if not universal, in the leases in the neighbourhood, giving

the lessees the option of determining the lease on notice. The correspondence respecting the new lease was silent as to the insertion of such a clause, but one of the earliest letters alluded to the proposed lease as a renewal of the former:—*Held*, 1st, that the lessees might have understood that such a clause was intended to be inserted in the new lease without putting a perverse or absurd construction on the correspondence, and that, whether such understanding was correct or incorrect, or was confined or not confined to the lessees, they ought not to be ordered to accept the lease without such a clause; 2ndly, that the tenant for life had not, under the will or otherwise, power to grant such a lease, and that the reversioner, though able to fulfil the agreement, was not entitled to demand a specific performance of it.

Quære, whether, in executory agreements, there is a presumption in favour of the insertion in the executed contract of all such stipulations as are customarily inserted in such contracts?

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towards the River Tyne, with horses, carts, or other carriages, all coals, cinders, stone, metals, and other things which, during the continuance of the term thereby granted, should be won, wrought, or gotten, by the lessees out of and from such pit or pits so to be sunk within the limits aforesaid, together with full and free liberty to make, lay, place, and fix, and use such branch or branches, to and from the said pit or pits, main waggon-way or waggon-ways, as should be necessary or convenient; and to build and make convenient bridges, mounts, batteries and cuts, in or upon the said pieces or parcels of ground, for the purposes aforesaid; and also to repair and amend the said waggon-way, bye-way, or side-way, branch and branches, and the said bridges, mounts, batteries, and cuts, respectively, from time to time, as there should be occasion; and also to bring, lay, place, and fix there all such rails, sleepers, deals, timber, iron, stones, gravel, and other materials and things, as should be needful or useful, as well for the making, laying, placing, and fixing, as for the amending and repairing of the main-way, and bye-way, or side-way, branch and branches respectively, from time to time, as there should be occasion; and also to make drains, trenches, or gutters, where the same should be necessary, for draining and carrying away the water from the said pits, ways, and branches, and to dig out and use the ground, earth, and stones, within the limits aforesaid, as well for the making, amending, and repairing the said ways and branches, from time to time, during the term of years thereby granted, as for the making, amending, and repairing the said mounts, bridges, batteries, and cuts, together with full and free liberty to bring and carry along the said main waggon-way, bye-way, and branches, or any of them, all such rails, sleepers, timber, matters, and things as should be necessary to be used or employed in and about the making, amending, and repairing the said ways and branches, or any of them, or in and about the said collieries and coal mines, for the convenient using, managing, and enjoying or carrying on the said collieries,

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coal mines, ways, and branches respectively; and also to do every other act and thing, in and upon the said pieces or parcels of land, which might be necessary, proper, and convenient for the having, using, and enjoying the said pits, and amending, repairing, and altering the said ways, branches, bridges, mounds, batteries and cuts, or any of them, subject to the restrictions therein mentioned as to the breadth of such ways or branches. Together, also, with full and free liberty to and for the said lessees to erect such hovels, sheds, or other buildings on the said pieces or parcels of ground aforesaid as the said lessees should have occasion for, or should be necessary or convenient for the engines, machines, stones, implements, and materials for the said collieries. And also, the like power to build on the said pieces of ground, any number of houses they might think proper, not exceeding eight. To have and to hold the said pits, ways, and all and singular the said liberties, powers, privileges, and premises thereby demised, for thirty-one years from May 12th then last, at the yearly rent of £200, for the yearly quantity of 1600 tons of coal, intended to be yearly during the said term thereby granted, won, wrought, and carried away, and to be paid whether such yearly quantity of 1600 tons should be wrought and carried away or not; and also such further additional sum or sums of money, as and for satisfaction for the damage or spoil of ground to be occasioned by such pit-room, heap-room, and placing and fixing such waggon-way, bye-way, side-way, and branches, as two indifferent persons, or their umpire, to be named as therein mentioned, should settle, such further yearly sums or sums to be paid on the 12th day of May in each year, after the same should be settled. And the lessees thereby covenanted, among other things, to allow Mr. Lawson yearly to take fifty fothers of small screened coals, without paying for the same; and also, during the continuance of the said term of thirty-one years, to uphold, maintain, and keep in good repair all such dwelling-houses as should from time to time

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be erected by the lessees on the said demised premises ; and at the end of the said demise peaceably to deliver up the same ways and buildings, and also to remove and carry away at their own expense, within six calendar months after the determination of the said term, all the timber, iron, metal and deals, used about the said ways, engines, and machines ; and if thereunto requested by Mr. Lawson, his heirs or assigns, to dig, fill up, throw down, and level all the pits, heaps, waggon-way, bye-way, or side-way, and other way or ways, and all the cuts, ditches, and trenches whatsoever, then made, formed, or laid out, by virtue of the lease, and put the land and ground in a good ploughable state and condition ; and there was a proviso, that, if the lessees, their executors, administrators or assigns, should at any time during the continuance of that demise, cease and decline working and carrying on the said collieries and coal mines thereinbefore mentioned, and should be minded and desirous that the said term of thirty-one years thereby granted should cease, and of such their mind or desire should give twelve calendar months' notice in writing to Mr. Lawson, his heirs or assigns, then and on such case happening, and upon such notice being given as aforesaid, the said term thereby granted should cease and determine at the end and expiration of such notice.

By another lease, dated April 23rd, 1808, and made between the same parties, Mr. Lawson demised unto the same lessees, their executors, administrators and assigns, full and free liberty, license, power and authority, at their own expense and charges, to erect and build upon the land or ground of Mr. Lawson therein described, fifty dwelling-houses, of brick or stone, for the use of the pitmen and workmen employed or to be employed by the lessees, in such situation and of such dimensions as therein mentioned ; and also the ground and soil on which such the houses might be built, together with all ways necessary or convenient for the houses, for the term of thirty-one years thence ensuing,

at the certain yearly rent of £40, and at the further yearly rent of 20*s.* for every additional house that should be built on the ground over and above the number of forty; and at the further yearly rent during the last ten years of the term, of £20 over and above the said rent of £40; and at a further yearly rent therein specified during the last ten years for houses so to be built above the number of forty. And the lessees covenanted to erect during the continuance of the lease at least forty houses, as therein mentioned, and to maintain and keep the same in repair. But this indenture did not contain any proviso, enabling or authorising the lessees to determine or put an end to the term of thirty-one years thereby granted.

Mr. Lawson, who was seised to him and his heirs for ever, according to the custom of the manor of Tynemouth, of the lands over which the way-leaves, easements, rights and privileges granted by the above-mentioned leases of the 19th August, 1807, and the 23rd April, 1808, were to be enjoyed, made his will, dated May 22nd, 1819, having previously surrendered all his copyhold lands and hereditaments to the use thereof, and thereby gave and devised all his freehold messuages, lands, and other hereditaments in Northumberland, to the use of trustees, upon certain trusts since satisfied or determined, and subject thereto, to the use and intent that the testator's wife, since deceased, might receive a jointure of £500; and subject thereto, to the use of the testator's eldest son, Mansfeldt de Cardonnel Lawson, for life, with remainder to the use of trustees and their heirs during his life, in trust to preserve contingent remainders, with remainder to the use of the testator's second son for life, with remainder to the same trustees and their heirs during the life of the second son, in trust to preserve contingent remainders; with remainder to the use of the first and other sons of the second son in tail general, with other remainders over. The will contained a clause, in the usual form, empowering

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tenants for life and in tail in possession, to grant leases of the freehold estates respectively, for any term not exceeding twenty-one years, so as that there were reserved in every such lease the best or most improved yearly rent or rents, to be incident to the immediate reversion of the hereditaments so to be demised, that could be reasonably had or gotten for the same, without taking any fine or premium; and so that the lessees were not by any clause or other words made dispunishable for waste, or exempted from punishment for committing waste; and the testator devised all his copyhold estates unto and to the use of two trustees, their heirs and assigns, upon, to, and for such trusts, intents, and purposes, and subject to such powers, provisos, and declarations as would correspond with, or best or most nearly correspond with, the uses, trusts, intents and purposes, powers and declarations thereinbefore expressed concerning the fee-simple lands thereby devised.

By a codicil to the will, dated May 22nd, 1820, the testator gave to every tenant for life or tenant in tail in possession of the devised estates, under the limitations contained in his will, and to the trustees or trustee for the time being of his will, during the minority of any such tenant for life or tenant in tail, power to sink and work collieries and mines on the devised estates, or any part thereof, and to demise such collieries and mines for any term not exceeding ninety-nine years, either with or without taking any fine or premium for such demise, so that every such demise should contain such stipulations for working the same collieries and mines as were usual in leases of collieries in the southern part of the county of Northumberland.

The testator died in June, 1820, and his eldest son, Mr. M. de Cardonnel Lawson, entered into possession of the copyhold estates, as tenant for life. In 1836, when the above-mentioned leases were approaching their termination, negotiations took place between Mr. M. de C. Lawson and

his agent and the defendants and their agent, respecting the grant of a fresh lease.

These negotiations were carried on by letters, one of the earliest being written to Mr. M. de Cardonnel Lawson, by the agent of the lessees, in the following terms:—

“ Burdon Main Colliery, Sept. 8, 1836.

“ Sir,—Your lease for way-leave, rents, &c. in your estate at Chirton will expire at Martinmas, 1837. We therefore beg to intimate that we are willing to enter into a negotiation for a renewal of the same for a limited period, and will feel obliged by your answer to this application at your earliest convenience.

“ I am, &c., for Self and Partners,

“ MICHL. ROBSON.”

After some correspondence, not material to be stated, the agent of Mr. Lawson addressed the following letter to the lessees' agent:—

“ Acton House, Jan. 9, 1838.

“ Sir,—Mr. Lawson being unable to write, from illness, has requested me to inform you that he has not altered his mind as regards the sum which he formerly demanded, through me, for way-leaves, &c. &c. through his property at Shields, except in this, that he is ready to grant a lease for fourteen years, provided he receives £750 from May, 1838, and £800 from May, 1839, when the lease of the cottages falls in. If it is necessary after this to have a meeting, which I do not think it will be, I can meet you in Newcastle on Saturday the 3rd of February.

“ Yours obediently,

“ M. J. MILLS.”

To this letter the lessees' agent sent the following answer, directed to Mr. Lawson himself:—

“ Willington, Jan. 19, 1838.

“ Sir,—I duly received Mr. Mills' letter of the 9th inst., and have since laid it before the owners of Burdon Main

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Colliery, who have desired us to say that, though they consider the terms demanded by you high, for way-leaves, pits, and houses they occupy as your tenants at Chirton, &c., they agree to accept a lease from you, for fourteen years from the 12th of May next, on the terms you propose, namely, £750 per annum from the 12th of May, 1838, and £800 per annum from the 12th of May, 1839, deducting the sum of 16*l*. 13*s*. 4*d*. annually, which is now paid you in lieu of fire-coal for the mansion-house. As the cause for the payment has entirely ceased, the owners hope you will see the reasonableness of agreeing to this request. The favour of your answer will oblige, &c.

“GEO. JOHNSON.”

Mr. Lawson replied as follows:—

“Acton House, Jan. 24, 1838.

“Dear Sir,—Illness has been the cause of my not answering yours of the 19th sooner. I agree to grant to the owners of Burdon Main Colliery a lease of fourteen years from May next, for the way-leaves, &c. &c. they at present occupy, they paying £750 per annum from May, 1838, to May, 1839, and £800 for the remainder of the lease, without any deduction as mentioned in your letter.

“I remain, dear Sir, yours, &c.,

“M. DE CARDONNEL LAWSON.”

To this the lessees' agent returned the following answer:—

“Willington, Jan. 31, 1838.

“Sir,—I am very sorry to hear of your continued illness. I have laid your letter of the 24th instant before the lessees of the Burdon Main Colliery, and am directed to inform you that they agree to accept a lease from you, for fourteen years, for the houses, way-leaves, and damaged ground at Chirton, on the terms contained in your letter.

“I am, &c.,

“M. de C. Lawson, Esq.

“GEO. JOHNSON.”

Mr. M. de C. Lawson died without issue, and the second son having died, his son, one of the present plaintiffs, became tenant in tail in possession; and in a suit in which he was plaintiff a receiver was appointed of the rents and profits of the real estates of the testator, A. M. de C. Lawson.

No lease was ever executed to the defendants pursuant to the agreement entered into with them by M. de C. Lawson; but after the expiration of the several terms granted, and agreed to be granted by the original lease, they continued in the possession of the premises thereby agreed to be demised or leased, and from time to time paid the rent to the trustees and the receiver, at the rate of £750 per annum, from the 12th of May, 1838, to the 12th of May, 1839, and at the rate of £800 from the 12th of May, 1839, as provided by the agreement for a fresh lease.

On April 29th, 1842, the defendants served upon the receiver a notice of their intention to quit and deliver up, on the 13th of May, 1843, the possession of the dwelling-houses, lands, way-leaves, and premises; and after some further steps, the trustees and the parties interested under the will of Mr. A. de C. Lawson instituted the present suit, to have the agreement for a fresh lease specifically performed. Evidence was adduced as to the custom of inserting in leases of way-leaves a clause similar to that contained in the original lease, giving the lessees power to determine the lease; and from such evidence it appeared that such custom was almost, if not quite, universal in the neighbourhood.

Mr. *Russell* and Mr. *Stevens*, for the plaintiffs, cited *Dowell v. Dew* (a) and *Campbell v. Leach* (b).

Mr. *Swanston* and Mr. *Bates*, for the defendants.—There

(a) 1 Y. & C. C. C. 345.

(b) Ambl. 740.

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is no instance in which a contract for a lease entered into with a tenant for life having a power of leasing has been enforced at the suit of the remainder-man. [The *Vice-Chancellor*.—It has been enforced against him, and is not the principle the same?] But in this case the tenant for life had no power to fulfil the contract; a grant of a way-leave, with heap-room, and liberty to commit waste, being clearly beyond the leasing power in the will, or the power of Mr. M. de C. Lawson, who was merely equitable tenant for life, and not in possession. Moreover, the power of leasing in the will could not authorise the grant of an incorporeal hereditament such as a way-leave; for how could the best or any rent be reserved upon such a lease? How could there be any distress? Co. Litt. 47. a. 142. a.; *Bird v. Higginson* (a). Such a lease being, therefore, not conformable to the power, would have been void to all intents and purposes: *Bowes v. East London Waterworks Company* (b). Even the present Mr. Lawson could not grant the lease, the jointure-trusts being still subsisting. But if he could, that would not be material, since the contract must be considered with reference to the title of the party who entered into it. There is no instance in which an agreement to exercise a power has been enforced, where the party entering into the agreement had not the power at the time.

Mr. *Russell*, in reply.—The rent to be reserved in a lease under a power need not be a rent for which there can be a distress. He referred to *dicta* in *Dayrell v. Hoare* (c).

The VICE-CHANCELLOR:—

In this case it seems to me doubtful whether the time, the lateness of the period at which the suit was instituted, is not a ground of objection to it, if it is not otherwise

(a) 6 Ad. & E. 824.

(b) Jac. 324.

(c) 12 Ad. & E. 367.

unsustainable. I do not determine that point, and whether the letters of 8th September, 1836, and 27th April, 1837, ought to be considered as actually part of the agreement in question between the colliery company represented by the defendants and the deceased tenant for life of the Chirton estate, I leave likewise undecided. Our law also may, or may not, agree exactly with what Menochius lays down (L. 3, Præs. 43), when he says: "*Cum ambigitur quid in confecto contractu promissum sit, præsumptio sumitur promissa fuisse ea quæ solent consuetudine et usu vel loci vel personæ adhiberi in contractibus.*" And, again,—"*Dicimus notarium præsumi rogatum adhibere clausulas quæ in similibus contractibus adhiberi solent.*" And if it does, the defendants may, or may not, bring their case within these passages. They, however, contend,—and, upon the pleadings and evidence, (to whatever remarks the testimony of Mr. Johnson, when compared with the pleadings, may be considered fairly open, as supporting, or not supporting, the defendants' case), it is, in my opinion, for every purpose of the present cause, reasonable to infer—that the agreement (whether composed, or not composed, in part of the two letters that I have specified, or either of them) was made in the belief on the part of the colliery company,—with the understanding on their part,—that, as the way-leave grant and way-leave agreement, which, before and in 1837, they held under Mr. Lawson, were determinable by them upon a twelvemonth's notice, so the grant or demise for which the contract in question was made was, (so far at least as the way-leaves were concerned,) to be determinable in a similar manner. Whether it ought to be considered that Mr. Lawson participated in that understanding, or had that belief also, I do not say nor intimate; nor do I mean to say or intimate whether the construction of the letters (whatever they were) which composed the agreement was or is so. That the belief or understanding, however, which I thus think it reasonable to ascribe to the colliery company, was merely

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perverse, merely absurd, or without any colour, could not be for any useful purpose alleged. But it is my opinion, upon the pleadings and evidence, that, whether this belief or understanding was correct or incorrect, was confined or was not confined to the company, it was not on their part an absurd or a perverse belief or understanding, or one without any colour. In my judgment, fair and reasonable men, in the circumstances in which they were placed, might, without supine ignorance, without gross negligence, have well entertained it, whether erroneously or not erroneously. If so, and if (as I have said that I think) they ought, for the purposes of the present suit to be taken to have entertained it, this is not a case in which a decree for specific performance ought to be made. That is my conclusion upon a ground, however, on which it is, perhaps, not necessary to decide the cause; for, as it appears to me, there is another on which the defence is sustainable. The agreement in question, considered, perhaps, with reference to its subject, but considered certainly with reference to its form, (independently of the question whether the will postponed the period at which the power of leasing the copyholds should commence to be exerciseable until a time that had not arrived when the agreement was made), was, in my opinion, one *ultra vires* of the deceased tenant for life; I think that it was one authorised neither legally nor equitably by any legal or equitable power of leasing vested in him; and, looking at the nature of the title to the Chirton estate, and the infancy of the present tenant in tail (one of the plaintiffs), notwithstanding the possession and enjoyment under the agreement, which must, I think, be taken to have been for some years had, that the plaintiffs are for this reason (if there were no other) precluded from the relief that they ask.

I consider it right to dismiss the bill, without prejudice to any action that may be brought against the defendants, or any of them.

Justice does not, I think, require, in a case such as this, that they should have the whole of their costs. I will, at the plaintiffs' option, give the defendants their costs subsequent to the replication only (to be taxed), or £50 for costs, without taxation.

If the plaintiffs elect the latter alternative, the form should, I suppose, be to order them to pay the costs (generally), not exceeding £50.

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BOUSFIELD v. MOULD.

June 12.

MR. BACON, on behalf of the plaintiff, moved for leave to withdraw the replication to the answer of one of the defendants, and to examine that defendant as a witness, and also for leave to re-examine a witness upon the same interrogatories who had been already examined, and to prove that a release had been executed by this witness. The point as to which the re-examination was sought, was as to a certain debt having been vested in the witness at the time of his bankruptcy. Publication had passed. The suit was instituted in May, 1843, which was before the passing of Lord Denman's act, 6 & 7 Vict. c. 86.

After the examination of witnesses between all the plaintiffs and all the defendants, leave cannot be given to withdraw the replication, and examine a defendant.
 A witness permitted to be re-examined upon the former interrogatories after releasing his interest.

Mr. *Russell* and Mr. *Hitchcock*, in opposition to the motion.—As to withdrawing the replication for the purpose of admitting evidence, it cannot be done after publication has passed. And as to the re-examination sought, Lord *Eldon* said, in *Vaughan v. Worrall* (a), “When, after the witness has been cross-examined to the bone on the last question, it appears that he has an interest in the suit, the judge must say that no attention could be given to his evidence; but whether they permit a release to be given, and the witness

(a) 2 Swanst. 400.

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to be asked the general question—is all that you have to say to-day true?—or the examination to be repeated, is that of which I am not informed. At a late period of my life, however, I certainly remember no such instance. It is a novelty to me to hear it said that if it appears that a witness was interested at the time of the examination, this Court knows any such practice as that, a release being given, the witness may then be re-examined. I believe that that never was done in any well-considered case. When, with knowledge that there might be an objection to the testimony, and not requiring on the one hand, or giving on the other, a release, the parties take their chance of interested testimony, it would lead to mischief beyond calculation if they were permitted, should the objection transpire in the progress of the cause, to release and re-examine, when it is almost morally impossible that the witness should be relieved from the influence which previously prevailed in his mind. Such a practice would be still more dangerous in equity than at law, where the witness stands before a tribunal which knows all that he has said, and can sift his evidence. In equity, one deposition will be suppressed and the other divulged; that is, in my opinion, a material objection to suffering these witnesses to be re-examined.”

Mr. *Bacon*, in reply, contended that Lord *Eldon's* observations in *Vaughan v. Worrall* (a) must be construed with reference to his introductory remarks, his Lordship having there said, “there is no doubt that, of late years, courts of justice have struggled to convert objections to the competence of a witness into objections to credit; and recent decisions (which, though it is difficult always to understand the grounds, are substantially right) establish this: that if the witness has no interest in the event of that cause, though his

(a) 2 Swanst. 402.

answer to the question may be evidence for or against him in another cause, that is not an objection to his competence; but I have never known that doctrine applied to a case in which a bill has been filed in this court, and the witnesses have engaged to pay the costs of the proceedings there; neither the plaintiff nor the witnesses could be otherwise than aware that they had an interest in the event of that suit." He cited *Milward v. Atkins* (a).

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The VICE-CHANCELLOR:—

The present case is not within the scope of the act 6 & 7 Vict. c. 85, and I must hold, according to the practice of the Court, that the defendant, Mary Mould, could not be examined without the replication being withdrawn, and that this cannot be done after witnesses have been examined as between all the plaintiffs and all the defendants. I must, therefore, refuse the motion as to the examination of Mary Mould.

With regard to the re-examination of Joseph Mould, the *dicta* ascribed to Lord Eldon in *Vaughan v. Worrall* are so general and extensive, that the difficulty of making the order sought for the re-examination of Joseph Mould may appear very considerable. However, the case of *Milward v. Atkins*, although only relating to an examination in the Master's office, is in favour of the present application; and if the *dicta* in *Vaughan v. Worrall* can be confined to the circumstances adverted to in the judgment, the two authorities may be reconcileable. Subject to any circumstances which the Registrar's book may disclose with regard to *Milward v. Atkins*, I shall make the order as to Joseph Mould, believing that I can do so consistently with Lord Eldon's *dicta* in *Vaughan v. Worrall*, otherwise I should certainly not venture to do so.

(a) Jac. 339, note (m).

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June 12:

A decree directed an inquiry whether certain younger children had made any and what assignments of their shares, and under what circumstances. One of the defendants, claiming to be an assignee of a share, carried into the Master's office a state of facts, setting forth the assignment under which he claimed. A co-defendant (one of the children) carried in a counter state of facts, impeaching the assignment, as having been executed for an inadequate consideration, and without legal assistance. A motion to suppress interrogatories, filed in support of the counter state of facts, as relating to questions in dispute between co-defendants only, and not in issue in the cause, was refused.

LENNARD v. CURZON.

THIS was a motion, made on behalf of G. N. Driver, a defendant, that certain interrogatories exhibited by Lord Teynham, another defendant, for the examination of witnesses in the Master's office might be suppressed or taken off the file.

The decree, dated February 23, 1844, directed, among other things, that the Master should inquire and state to the Court whether the younger children or child of Henry Roper, Lord Teynham, and Bridget his wife, or any and which of them, or the husband or husbands respectively of such of any of them, as being a daughter or daughters, was or were married, had ever, and when, made to any and what person or persons any and what assignments, incumbrances, or dispositions, assignment, incumbrance, or disposition, which were or was still subsisting of their, or any and which of their respective shares of the trust, stocks, funds, and securities in the pleadings mentioned, or any and what parts or part thereof respectively, and under what circumstances such assignments and dispositions respectively were made, and in whom such incumbrances, and the rights or interests assigned or disposed of by such assignments or dispositions respectively, were then vested.

A state of facts was brought in on November 12, 1846, on behalf of the defendant Driver, stating various indentures; and finally an indenture, dated the 15th day of May, 1820, and made between the defendant Lord Teynham, then one of the younger sons of Henry Roper Curzon the elder, afterwards Lord Teynham, and since deceased, and Bridget his wife, of the one part, and the defendant Driver of the other part, whereby Lord Teynham assigned unto the defendant Driver, his executors, administrators, and assigns, the share of Lord Teynham of and in a sum of £15,000, part of the trust-funds mentioned in the plead-

ings, subject to certain life interests. And the state of facts charged that under this indenture the defendant was then absolutely entitled to and for his own use and benefit to the share and interest thereby assigned.

On November 24, 1846, the Master directed that the consideration of this state of facts should stand over for a counter state of facts on the part of the defendant Lord Teynham.

On the 27th November, Lord Teynham's solicitor carried in a state of facts on his behalf, stating the circumstances under which, as the defendants alleged, the assignment referred to in the said state of facts of the said G. N. Driver had been executed; and such state of facts stated that, in April, 1820, the defendant Lord Teynham, then the Hon. G. H. Roper Curzon, applied to Messrs. Driver, who then carried on the business of surveyors and land-agents in Bridge-street, Blackfriars, in the city of London, to purchase or obtain a purchaser for the reversionary interest in the sum of £1000 sterling, to which he then considered himself entitled under or by virtue of the thereinbefore stated deed-poll, upon the decease of his father, the said Henry Roper Curzon, and Bridget his wife, and that the said Messrs. Driver on that occasion suggested to the said defendant, G. H. Roper Curzon, now Lord Teynham, that, to make the sale legal and valid, it was necessary that such reversionary interest should be put up to sale by public auction; and that the said defendant thereupon consented to the same being put up to sale by them, and that they took upon themselves to include in such sale the contingent reversionary interest, to which the said defendant Lord Teynham then considered himself entitled in the residue of the sum of £15,000 sterling, after providing for the said £9000, to which step the defendant Lord Teynham did not make any objection; and that the said Messrs. Driver accordingly, in April, 1820, advertised the vested and contingent reversionary interest for sale in the public

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newspapers, and put the same up to sale on the 27th April, 1820, and that the same were knocked down to the defendant G. N. Driver, at the sum of £205, but that the defendant Lord Teynham was wholly ignorant how the said defendant G. N. Driver became a bidder at such sale, or whether he purchased on his own behalf or as the then agent only for Messrs. Driver, and that Messrs. Driver having communicated the result of the sale to Lord Teynham, the assignment, set forth in the state of facts of Mr. Driver, was prepared by Mr. Driver's solicitor, and the engrossment thereof forwarded to the defendant Lord Teynham, at Spike Island, in Ireland, where he executed the same and received the purchase-money, without having had either the draft or engrossment thereof perused by any counsel or solicitor on his behalf, or even having consulted any legal adviser with respect to the assignment, or during any part of the transaction relating to the sale; and that at the several times of such sale and assignment, neither the defendant Lord Teynham, the defendant G. N. Driver, nor Messrs. Driver were aware that the appointment under which Lord Teynham's interest arose contained the words "and the increase and accumulation thereof." The state of facts contained many other statements, with the view of impeaching the assignment by Lord Teynham to Mr. G. N. Driver, for inadequacy of price and otherwise; and charged that, under the indenture of the 15th May, 1820, the defendant G. N. Driver was entitled to a sum of £1000 sterling, to be paid out of Lord Teynham's share of the surplus to arise from a certain sum of stock therein mentioned, and the increase and accumulations thereof, and annual produce thereof, and that the remainder of such share belonged to and was vested in Lord Teynham absolutely; or in case the defendant G. N. Driver should insist that the said sale and assignment comprehended a reversionary interest in one-sixth part of a sum of £25,000 £3 per cent. annuities therein mentioned, then the defendant

Lord Teynham charged that the sale and assignment were, under the circumstances aforesaid, void, and that the said defendant Lord Teynham was entitled to the whole of the said one-sixth part, upon repaying the purchase-money with interest, which he was willing to do.

On December 4, 1846, it was contended before the Master, on behalf of the defendant G. N. Driver, that Lord Teynham's state of facts ought to be disallowed; and the Master took time to consider, and had not yet given any decision, or approved of the state of facts.

On May 9, 1847, interrogatories for the examination of witnesses were left at the examiner's office in support of Lord Teynham's state of facts, and the present motion was for the suppression of these interrogatories.

Mr. *Bacon* and Mr. *Hallett*, in support of the motion, cited *Cottingham v. Shrewsbury* (a), *Eccleston v. Lord Skelmersdale* (b), *Trevelyan v. White* (c), *Goodwin v. Cleasby* (d), Order LI. of April 3, 1828, and Smith's Chancery Practice, Vol. 2, pp. 150, 163; and contended that the questions raised by Lord Teynham's state of facts, as to the validity of the assignment, were not in issue in the cause, nor could be so, being questions between co-defendants only, and that they ought to have been made the subject of a separate suit.

The VICE-CHANCELLOR, without calling on the other side, said, that the Decree directed the Master to inquire under what circumstances a certain deed was executed. The interrogatories had reference to this inquiry, and the case of *Cottingham v. Shrewsbury* would not govern the present in this stage of the cause, if at all. There appeared no ground for suppressing the interrogatories, or taking them off the file.

Motion refused.

(a) 3 Hare, 627.

(b) 1 Beav. 396.

(c) 1 Beav. 588.

(d) 2 Id. 30.

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April 17th.

HEDGES v. CLARKE.

Where the Master finds by his report that there is no settlement of a fund in Court to which a married woman is entitled, it is the general rule, that application should be made for payment to the husband by petition presented after the decree on further directions has been made, in order that it may be in evidence before the Court, by affidavit, that, at the date of the decree on further directions there was no settlement of the fund in Court; yet when the sum is small (under £200), and all parties to the suit consent, the Court will not put the parties to the expense of a petition, but insert an order for payment to the husband in the decree on further directions.

THE Master, by his report, found that certain married ladies, parties to the suit with their husbands, as plaintiffs, were entitled each to one-fifth of a sum of money not exceeding £200 each, out of trust-funds in the cause, and that there was no settlement of any of the sums to which the ladies were entitled.

The cause now came on to be heard on further directions.

Mr. *Spurrier*, for the plaintiffs, asked that a direction might be inserted in the decree for payment of these sums to the husbands, without putting the parties to the expense of a petition.

The VICE-CHANCELLOR, after consulting the Registrar, (who stated the rule of practice to be, that payment of money found due to the wife can be obtained by the husband only upon petition presented after the decree made finally, entitling the married lady, and that the reason was, that the Court required to be judicially satisfied that there had been no settlement up to the date of the decree, and that a petition was necessary to admit proof of that fact by affidavit), said, that, although this was the general rule, yet, upon the consent of all parties, and where the sums were so small, the rule might properly be relaxed, and the order for payment to the husband be inserted in the decree on further directions; which was accordingly done.

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ARROW v. MELLISH.

May 24th, &
June 5th.

JOHN MOORE made his will, dated November 6, 1800, containing the following bequest:—"To her my said wife, I give and bequeath the use and usage of all my worldly goods, money, and other effects which I may die possessed of, to have and to hold during her natural life, and at her death I give and bequeath the same to my three nieces, viz., Elizabeth, Catherine, and Sarah, daughters of my brother William Moore, and also to Mary Arrow, daughter of John Roxbee, niece to my said wife, Mary Moore, to be by them equally divided, share and share alike, and at their deaths to go equally, share and share alike, to their children."

Neither of the testator's nieces had any child, except Catherine, who had one child only, and this child died an infant in the lifetime of the testator. Mary Arrow had two children, who survived the testator, but had died several years ago. One of the defendants, named William Crick, had taken out letters of administration to them, and the question was, whether, as their administrator, he was entitled to the three shares of the testator's nieces who died without leaving any child, or whether, in the events which had happened, there was an intestacy as to these shares, which were claimed on that ground by the plaintiff as representing the testator's next of kin.

Mr. *Bagshawe* and Mr. *Malins*, for the plaintiff, cited *Taniere v. Pearkes* (a), *Flinn v. Jenkins* (b), and an unreported case of *Willes v. Douglas*, before the Master of the Rolls, in which a testatrix had bequeathed the remainder of her funded property at the decease of her sister, Jane Somerville, to Francis Willes and Francis Charles Johnson, in trust, to be equally divided between her first cousins, Mary

(a) 2 Sim. & St. 383.

(b) 1 Coll. 365.

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Johnson, the wife of Charles Johnson, Charlotte Lovell, the wife of Peter Harvey Lovell, and Margaret Lucy Atty, the wife of Robert Middleton Atty; and directed that the interest arising therefrom should be received by plaintiffs, and equally divided, share and share alike, between the said Mary Johnson, Charlotte Lovell, and Margaret Lucy Atty, separate and distinct from their said husbands, and for their sole use, and at their decease to be divided amongst their daughters. One of them had a daughter, and the Master of the Rolls decided that that daughter took an immediate interest in one-third of the corpus.

Mr. *Southgate*, for the defendant Crick, cited *Malcolm v. Martin* (a), *Pearce v. Edmeades* (b), *Smith v. Streatfield* (c), and *Armstrong v. Eldridge* (d).

Mr. *Chandless* appeared for the trustees.

The VICE-CHANCELLOR:—

In this case the words “their children” must mean “their respective children.” I have not a doubt in my own mind of the intention of the testator. The only question seems to be, whether I am bound by the decisions in *Malcolm v. Martin*, *Pearce v. Edmeades*, and *Smith v. Streatfield*, to decide in favour of Mr. Crick’s view of the will. I think that not one of those cases compels me to do so, and I therefore decline doing so. I think the plaintiff right.

(a) 3 Bro. C. C. 50.
 (c) 1 Mer. 358.

(b) 1 Younge, 357.
 (d) 3 B. C. C. 215.

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WROUGHTON v. COLQUHOUN.

July 19 & 29.

THIS case, which is reported ante, p. 36, now came on again upon further directions. The suit was instituted by the residuary legatee for the general administration of the estate. It appeared that the assets were insufficient for the payment in full of the pecuniary legacies and annuity; and the first question discussed was as to the payment of the costs of the plaintiff.

Where a testator's effects are insufficient to satisfy an annuity bequeathed by the will and the pecuniary legacies:—*Held*, that the annuity ought to be valued, and that the annuitant was entitled at once to the amount of the valuation, subject to an abatement in proportion to the abatement of the pecuniary legacies; and that, although the annuitant died before the payment of the annuity in full would have equalled the abated amount of the valuation, the other legatees would have no claim to the surplus of that amount.

Mr. C. P. Cooper and Mr. Briggs, for the plaintiff.—The plaintiff is entitled to have his costs out of the estate, to be taxed as between solicitor and client, in analogy to the rule which has been adopted in the case of an administration bill filed by a simple contract creditor, where the assets are only sufficient to pay the specialty debts: *Tootal v. Spicer* (a). The reason on which that rule is founded, viz. that the plaintiff's proceeding has benefited other parties exclusively, and that he ought not to be a loser by it, applies equally in this case, where the plaintiff, as it turns out, will receive nothing; and your Honor has in fact already so decided in *Burkitt v. Ransom* (b). If, however, the Court thought that it could not direct the general costs of the plaintiff to be paid as between solicitor and client, at all events the plaintiff ought to be allowed the expense of attending by counsel in the Master's office. It is within the terms of the 120th Order of May, 1845, which enables the Taxing Master, in taxing costs as

In a suit instituted by a residuary legatee, the assets proved insufficient for the payment of the

expenses and the general legacies:—*Held*, that the plaintiff was not entitled to his costs as between solicitor and client, except so far as the general estate had been increased by the proceeding.

The costs incurred by a legatee, who has instituted an administration suit, in attending before the Master by counsel in support of his state of facts—*Held* not to be within the 120th Order of May, 1845, as incurred upon a question relating to title.

(a) 4 Sim. 510; and see *Brodie v. Bolton*, 3 Myl. & K. 168; and *Larkins v. Paxton*, 2 Id. 32.

(b) 2 Coll. 536.

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between party and party, to allow the expenses of counsel's attendance in the Master's office upon questions relating to title. It would be very extraordinary if the expense of having the state of facts settled by counsel were allowed, and yet the counsel were not allowed to go before the Master to support the state of facts which he had settled.

Mr. *Russell*, Mr. *Wigram*, Mr. *Kenyon Parker*, Mr. *Lloyd*, Mr. *Stevens*, Mr. *Toller*, and Mr. *Chichester*, appeared for the defendants.

The VICE-CHANCELLOR:—

I cannot venture to decide that the discussion before the Master in this case involved any matter of title within the meaning of the 120th Order. In the sense which it has been contended should be given to that expression, almost every question that came before a court of equity would be a question of title. It would be too bold and wide a construction to put upon the Order.

I think the costs must be taxed as between party and party only, except so far as they have been augmented by any proceedings taken with a view to increase the testator's estate. If a distinct authority had been produced, I should have been glad to follow it, and to decide the case on the principle adopted as between simple contract and specialty creditors, in the case cited. But unless some distinct authority existed, I should be creating a new practice, and not following the old, in giving costs as between solicitor and client; that, if it is to be done, had better be done elsewhere. In the case before me, which has been referred to, I must have proceeded on the absence of opposition. In the absence of opposition I must have thought it, as I should still think it in the abstract, reasonable to accede to the plaintiff's application. But as it is here opposed, I think it the more reasonable and proper, and the bet-

ter course, not to take upon myself to introduce a new practice.

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A discussion then took place as to the form of the decree as between the defendants with respect to the abatement of the annuity and the pecuniary legacies; and the case was ordered to stand over, that precedents of such decrees might be referred to.

The case came on on this day to be spoken to on the question of abatement.

June 20.

Mr. *Wigram*, for the annuitant, referred to an unreported case of *Carr v. Ingleby* (a).

Mr. *Toller*, for the residuary legatee, referred to *Bowker v. Bowker* (b), *May v. Bennett* (c), *Hodge v. Lewin* (d), *Arundell v. Arundell* (e), *Kendall v. Russell* (f), *Attorney-General v. Poulden* (g), *Foster v. Smith* (h), *Phillips v. Phillips* (i), *Cupit v. Jackson* (k), *Manly v. Hawkins* (l), *Darvies v. Wattier* (m), and contended that the proper decree would be, to direct the annuity to be valued, then to make a proportional abatement in the amount of the valuation, and to invest the abated amount, and pay the dividends and a competent part of the capital to make up the whole annuity, from time to time to the annuitant, giving the remaining principal (if any) of the fund, after paying the pecuniary legatees in full, to the residuary legatee at the death of the annuitant.

Mr. *Russell* referred to another unreported case of *Long v. Hughes* (n), in which the annuity had been valued in

(a) Vide post, 362.

(b) Seton on Decrees, 70.

(c) 1 Russ. 370.

(d) 1 Beav. 431.

(e) 1 Myl. & K. 316.

(f) 3 Sim. 424.

(g) 3 Hare, 555.

(h) 2 Y. & C. C. C. 193.

(i) 3 Hare, 281.

(k) 13 Price, 721, 733.

(l) 1 D. & Walsh. 371.

(m) 1 Sim. & Stu. 463.

(n) Vide post, 364.

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consequence of the deficiency of the assets, and a proportional abatement having been made, the reduced fund was set apart: and the annuitant having died, the whole fund was transferred to the annuitant's personal representatives.

Mr. *Monro*, the Registrar, concurred with Mr. *Russell* in representing this as the usual course in such a case.

The VICE-CHANCELLOR:—

This will contains a general gift of an annuity, general gifts of legacies, and a gift of the residue; and the entire estate is insufficient to pay the annuity of £260, and the pecuniary legacies of £1000 and £500. I understand the course of the Court, as represented by Mr. *Monro* and by Mr. *Russell* from a MS. case, to be this,—to give the annuitant the whole value of the annuity, though he may die the next day. If the question were a new one, I might have been disposed to deal thus with it: to apply the fund set apart as long as it would last in payment of the annuity in full, but not to give the annuitant, in any event, more than the testator intended for her, and to give the surplus (if any) to the other legatees. I understand, however, the course to be settled; and that it is to give the annuitant the benefit of the chance of dying before the payment of the annuity in full has exhausted the fund set apart at its reduced value. Nothing could try the question better than the case mentioned by Mr. *Russell*, where the annuitant had died, and her representatives were allowed the full value of the annuity.

The following were the minutes of the portions of the Decree relating to the points discussed:—

“ Refer it back to the Taxing Master to review his taxation of costs under the Order of 26th November, 1846, so far as respects the fees paid to plaintiff's counsel on attending the Master

on examination of witnesses *vivâ voce*, which costs are to be allowed to the plaintiffs.

“Refer it to the Master to make a valuation of the annuity of 260*l.* bequeathed to the defendant, Charlotte Clarke, during her life, and refer it to the Master to apportion the fund in Court, after paying the costs between the annuitant and the pecuniary legatees, having regard to the value of the annuity found by the Master, and having regard to the amount received by the annuitant in respect of her annuity, and by the legatees in respect of the interest of their legacies. Let what the Master shall so apportion in respect of the annuity and legacies be paid to the annuitant and legatees respectively.”

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In pursuance of the above Decree the Master proceeded to set a value on the annuity, and, according to the value so set upon it, the assets would have been sufficient to pay the amount in full, as well as the pecuniary legacies.

Exceptions to the report were taken by the annuitant, and were heard on April 14th, 1848, when the Master was directed to review his report. The matter was subsequently settled by arrangement between the parties.

The Reporters are enabled, by the kindness of Mr. *Russell* and Mr. *Wigram*, to supply the following particulars of the two unreported cases referred to in the above argument:—

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July 8, 1827,
& July 31,
1831.

CARR v. INGLEBY.

Where a testator bequeathed to his widow two annuities, one payable to her so long as she should continue his widow, provided she should not permanently quit England before her daughter's marriage, and the other payable to her generally for life, and the assets were insufficient to pay the annuities and legacies in full, the Court ordered the annuities to be valued and to abate proportionably with the legacies; and directed the amount of the apportionment, in respect of the former of the annuities, to be laid out in the purchase of a Government annuity, and the amount of the apportionment of the latter of the annuities to be paid out to the annuitant.

THE testator, John Ingleby, by his will, dated February 11, 1822, gave and bequeathed to his wife, Eupheme Ingleby, one of the defendants, an annuity or yearly sum of 400*l.* during her life, in case she should so long continue his widow; the said annuity to be paid by equal half-yearly payments, without any deduction or abatement whatsoever on account of taxes or otherwise, and the first half-yearly payment of the said annuity to be made at the expiration of six calendar months from the day of his death; and the said testator thereby directed that the provision thereby made or intended for his said wife should be accepted by her as and for her jointure, and in lieu and full satisfaction of all dower and thirds or free bench. And the testator directed that the executors or administrators of his said wife should be entitled to receive and be paid a proportion of her annuity, according to the time which should have elapsed from the last half-yearly payment thereof preceding her death, up to the time of her decease, in case she should die without having married again, and in case she should not have committed or occasioned any forfeiture of her said annuity under the domiciliary restrictions therein-after contained. And the said testator, after stating that it was his earnest wish and express desire that his daughter therein named should constantly have the benefit of the advice, protection, and society of his said wife during their joint lives, or until the marriage of his daughter, and that she should enjoy those advantages without quitting England, thereby directed, that, in case his said wife should, at any time before the marriage of his said daughter, permanently quit England, or should take up her habitual and general residence in any part of the united kingdom of Great Britain and Ireland, except England, then, and in such case, and from and immediately after such domiciliation out of England, the annuity therein before bequeathed to his said wife should cease and determine to all intents and purposes whatsoever, as if the same had not been given by his will, or as if his said wife were naturally dead; but this restriction was not meant to prohibit occasional temporary visits out of England, made *bonâ fide* as such. By a codicil to the will, dated the 21st day of February, 1823, the testator revoked a legacy of 500*l.* given by his will to his sister, Mary Ingleby, and gave and bequeathed unto Archibald Corbett and the plaintiff the sum of 3000*l.*, upon trusts for the benefit of his sister and her children, in manner therein particularly mentioned; and he hereby ratified and confirmed his said will in all respects, save only as thereby expressly revoked. By another codicil, dated September 5, 1825, he bequeathed to his wife, Eupheme Ingleby, the sum of 1500*l.* for her use and benefit during her life;

and he thereby directed his executors to pay the same out of his personal estate, and after her decease to revert to his daughter, Ellen Ingleby. By a further codicil to his will, bearing date September 27, 1825, the testator, amongst other legacies therein mentioned, bequeathed to his wife the further sum of 200*l.* per annum during her natural life.

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The following was the Decree, on further directions, so far as relates to the annuities:—

And it is ordered, that what the said Master shall find to be the clear residue of the said testator's personal estate not specifically bequeathed, after the several deductions throughout hereinbefore directed, be apportioned between the said defendant, Eupheme Ingleby, and the said Mary Ingleby in the manner hereinafter directed.

And it appearing that the personal estate of the testator is insufficient to pay the several legacies of 3000*l.* and 1500*l.*, and the annuities of 400*l.* and 200*l.*, given by his will and codicil, to the full amount thereof, his Honor doth declare that the said legacies and annuities ought to abate proportionably; and it is ordered that the said Master do ascertain and settle the abatements and apportionments.

And it is ordered, that the said Master do ascertain the separate value of the said annuities as at the death of the said testator, and compute interest at four per cent. per annum on such value from the death of the testator down to the time to which interest should be computed on the said legacies; and he is to compute interest on the said legacies at the same rate.

And it is ordered, that the payments appearing by the report to have been made to the defendant, Eupheme Ingleby, on the account of the annuities and the interest of the said legacy of 1500*l.*, be deducted from what the said Master shall find to be the amount of the apportionment in respect of the said annuities and of the interest thereon, and of the interest on the said legacy of 1500*l.*

And it is ordered, that what the said Master shall certify to be the amount of the apportionment in respect of the said annuity of 400*l.*, be laid out by the plaintiff and defendants, Eupheme Ingleby and Archibald Corbett, out of such residue, in their names, in the purchase of a Government annuity for the life of the said defendant, Eupheme Ingleby, payable half-yearly. And it

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is ordered that they do receive and pay such annuity to her so long as she shall continue the testator's widow, provided she shall not, at any time before the marriage of the said infant defendant, Ellen Ingleby, permanently quit England or take up her habitual and general residence in any part of Great Britain and Ireland except England.

And it is ordered, that what the Master shall find to be the amount of the apportionment in respect of the said annuity of 200*l.*, and of the interest thereon, and of the interest on the said annuity of 400*l.*, and on the 1500*l.* legacy, after making such deductions as aforesaid, be paid by the said plaintiff and the defendants, Eupheme Ingleby and Archibald Corbett, to the said defendant, Eupheme Ingleby."

ROLLS.

Dec. 1, 1824,
 Feb. 26, 1829,
 & Dec. 9, 1831.

Form of decree where an annuity abates by reason of deficiency of assets. Amount of abated valuation ordered to be paid to representatives of deceased annuitants.

LONG v. HUGHES.

IN this case the testatrix, Sarah Evans, by her will, dated the 3rd of April, 1822, after giving several pecuniary legacies, bequeathed unto William Messiter and his assigns, during his life, an annuity of 30*l.*, and unto Mr. James Draper and his assigns, during his life, an annuity of 20*l.*, and bequeathed several other annuities in the same form, all which said thereinbefore mentioned annuities she directed should be paid to the respective annuitants thereof by equal half-yearly payments, without deduction for taxes or otherwise; and that the first half-yearly payment of the said annuities respectively should be made at the end of six months next after her decease.

1829.
 Feb. 26.

On the cause coming on to be heard on this day for further directions on the Master's report,—

It was ordered, that the other legacies bequeathed by the said testatrix were not entitled to any preference over the annuities bequeathed by her, and that the said other legacies and the said annuities ought to abate proportionably: and for the purpose of such proportional abatement, it was ordered that it should be referred to the Master to ascertain the value of the said annuities respectively, as at the death of the testatrix; and in so doing he was to have regard to the circumstance that the said annuities were given free from legacy duty; and he was to compute interest, at the rate of 4*l.*

per cent. per annum on such estimated value of the said annuities respectively, from the death of the testatrix down to the time to which interest should be computed on the legacies. And it was ordered, that it should be referred to the Master to compute subsequent interest on the legacies bequeathed by the will of the said testatrix from the foot of his said report.

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The cause coming on again on this day for further directions,—

1831.
Dec. 9.

It was ordered, that the Master should apportion the remainder of the said several sums of 2674*l.* 1*s.* 5*d.* and 85*l.* 13*s.* 11*d.* cash, and the said residue of the said balance, after payment of costs, as among the annuitants and legatees rateably; and in so doing, the Master was to take the annuities at the value mentioned in his Report, dated the 12th of August, 1829, and to add to the apportionment of each annuitant the legacy-duty that would be payable in respect of the sum so apportioned.

And it was ordered, that the Master should compute interest at the rate of 4*l.* per cent. per annum on the balance remaining due on such estimated value of the annuities respectively, and on the balance remaining due in respect of the legacies from the foot of his last report.

And if the said Master, in making such apportionment, should find that any of the annuitants or legatees had not received the sums apportioned to them by his said Report, he was to add the same to the sums to be apportioned to them respectively.

And it was ordered, that what should be so apportioned to the said legatees and annuitants respectively, should be paid by the said Accountant-General, out of the funds therein mentioned, to the several persons to whom the said Master should report the same to be due, or to *their respective legal personal representatives, in case any of them* were or should be dead before the same was paid, except in respect of certain pecuniary legacies therein mentioned.

1847.

June 7 & 26.

CUNNINGHAM v. MURRAY.

A testator gave his property (all being personally) to trustees upon trust to pay his debts, and he gave certain legacies and three annuities to three ladies, and he gave the residue of the dividends arising during the lives of the three annuitants to H. S. and A. C., married ladies, for their lives, and, after the deaths of the three annuitants, as to all the rest of his estate, he bequeathed the same to the said H. S. and A. C., and their several children, to be divided between them in equal shares:—*Held*, first, that there was an intestacy as to the surplus income from the death of the survivor of H. S. and A. C. until the death of the survivor of the three annuitants:—*Held*, secondly, that the gift to H. S. and A. C., and their several children, was a gift *per capita* and not *per stirpes*.

JOHN KILPATRICK made his will, dated the 29th of July, 1839, and after appointing John Thomas Church and Adam Murray executors, to whom he gave nineteen guineas each, he gave his estate, goods, chattels, and effects to the said J. T. Church and A. Murray, upon trusts, in the following words:—"Upon trust, as soon after my decease as they conveniently can, to collect, get in, and convert the same into money, by public or private sale, as they may think proper, and to invest the same (subject to the payment of the several legacies by me specifically bequeathed, and to the payment of my debts, funeral and testamentary expenses) in the purchase of some or one of the Government stocks or funds of Great Britain, and to stand and be possessed of the same, and the dividends, interest, and annual income arising therefrom, and to pay and apply the same as by me hereinafter directed; that is to say, in the first place to pay all my just debts, funeral and testamentary expenses;" and from and after payment thereof the testator gave unto Magdalen Lauremer, spinster, £100, and to Mary Baker, spinster, £1000; the same two legacies to be paid within six months after the testator's decease; and the testator gave unto Helen Stuart, widow, £300, and unto Agnes Cunningham, widow, £300, the said Helen and Agnes being the daughters of the late James Kilpatrick, deceased. Also the testator gave unto Helen Stuart and (a) Stuart, spinsters, and two of the daughters of the said Helen Stuart, widow, the annual sums of £25 apiece during their lives. The testator also gave unto Elizabeth Cunningham, the daughter of the said Agnes Cunningham, the annual sum of £25 during her life, the first payments of the three annual sums to begin

(a) So in the will.

at the end of six months after the death of the testator. The will then proceeded as follows:—"And I also give and bequeath the residue of the dividends and annual income arising during the lives of the said Helen Stuart and

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(a) Stuart, daughter of the said Helen Stuart, widow, and Elizabeth Cunningham, unto the said Helen Stuart, the mother, and the said Agnes Cunningham, to be paid them half-yearly during their lives, in equal proportions, for their own separate use, and not to be liable to the control or debts of any husband they or either of them may marry; and from and after the death of the said Helen Stuart, the daughter, and (a) Stuart and Elizabeth Cunningham, as to all the rest and residue of my said estate and effects, of what nature or kind soever, and wheresoever situate, I give, devise, and bequeath the same unto the said Helen Stuart and Agnes Cunningham, and their several children, to be divided between them in equal shares and proportions."

In 1840 the testator died, without leaving any widow, and not seised of any real estate. Mrs. Stuart and Mrs. Cunningham, both mentioned in his will, were his only next of kin living at his death. Mrs. Stuart died in 1844, and Mrs. Cunningham died in 1846. Elizabeth Cunningham, mentioned in the will, was the only child of Mrs. Cunningham; she by marriage became Mrs. Hay, and was a party to the original suit, but died shortly after its institution, and the suit was revived against her administrator. Mrs. Stuart had at the date of the will five children; of whom Helen Stuart and Agnes Jane Stuart, found by the Master to be the person designated as Stuart, annuitants mentioned in the testator's will, were two. All of those five children were, in person or by representation, parties to the suit.

Two of the annuitants of £25 each were still alive.

This cause now coming on for hearing on further direc-

(a) So in the will.

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tions, the questions were,—first, as to the testator's estate after the death of the annuitants, whether it was divisible *per capita* or *per stirpes*; secondly, whether the surplus of the income of the testator's estate during the lives of the annuitants was residue, distributable as such under the will, or undisposed of, and as such belonging to the testator's next of kin. The arguments were mainly directed to the first of these questions.

Sir Francis Simpkinson, Mr. Pigott, and Mr. J. H. Palmer, for the plaintiff, the representative of Mrs. Cunningham.

Mr. Russell and Mr. Goodeve for Mrs. Hay's representative, in the same interest with the plaintiff.

It was contended, on behalf of the plaintiff and this defendant, that the division between the two ladies should be *per stirpes* and not *per capita*, and the following cases were cited:—*Brett v. Horton* (a), as being nearly identical with the present case, *Flinn v. Jenkins* (b), *Waddington v. Waddington* (c), *Woodstock v. Shillitoe* (d), *Rowland v. Gorsuch* (e), *Booth v. Vicars* (f), *Wild's case* (g).

Mr. Lee and Mr. J. H. Law, for one of the defendants, a daughter of Mrs. Stuart.

Mr. Wigram and Mr. Cotton, for two other defendants, daughters of Mrs. Stuart.

Mr. Anderdon and Mr. Shapter, for another daughter, and her husband and incumbrancers upon their shares.

Mr. Anderson, for another defendant.

Mr. Hubback, for another defendant.

(a) 4 Bea. 239.

(b) 1 Coll. 365.

(c) 2 Hare, 54.

(d) 6 Simons, 416.

(e) 2 Cox, 187.

(f) 1 Coll. 6.

(g) 6 Rep. 16 b.

For all these defendants it was contended, that the division of the residue should be *per capita*; in support of which the following cases were cited: *Oates v. Jackson* (a), *Jeffery v. Honeywood* (b), *Crockett v. Crockett* (c), *Raihes v. Ward* (d), *Blackler v. Webb* (e), *Richabe v. Garwood* (f), *Lenden v. Blackmore* (g), *Dowding v. Smith* (h), *Dyer v. Dyer* (i), *Lady Lincoln v. Pelham* (k), and *Heron v. Stokes* (l).

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On the second question, *Watson v. Hayes* (m) and *Bullock v. Stones* (n) were cited.

Mr. *Spurrier* appeared for the executors.

The following cases were also referred to in the argument: *Morse v. Morse* (o), *De Witte v. De Witte* (p), *Beales v. Crisford* (q), and *Batsford v. Kebbell* (r).

The VICE-CHANCELLOR:—

June 26.

The facts upon which the questions in this cause, as to the construction of the will of the testator, Mr. John Kilpatrick, arise, are, that the testator left Mrs. Stuart and Mrs. Cunningham, both mentioned in his will, his sole next of kin at his death; that Mrs. Hay (called in the will Elizabeth Cunningham), the daughter of Mrs. Cunningham, survived him, but has since died, having been survived by Mrs. Stuart, who was herself survived by Mrs. Cunningham, since also deceased; that Mrs. Hay was Mrs. Cunningham's only child; that Mrs. Stuart had five children only living

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| (a) 2 Strange, 1172. | (i) 1 Mer. 414. |
| (b) 4 Madd. 398; and see there-
on 2 Jarm. on Wills, 313. | (k) 10 Ves. 167. |
| (c) 1 Hare, 451. | (l) 2 Dru. & War. 89. |
| (d) Id. 445. | (m) 9 Sim. 500. |
| (e) 2 P. Wms. 383. | (n) 2 Ves. sen. 521. |
| (f) 8 Beav. 579. | (o) 2 Sim. 485. |
| (g) 10 Sim. 626. | (p) 11 Id. 41. |
| (h) 3 Beav. 541. | (q) 13 Id. 592. |
| | (r) 3 Ves. 363. |

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at the date of the will, (which particularly mentions two of them), and had not any child afterwards; and that those five children are parties to the suit. It appears that two of the annuitants of £25 per annum each have survived both Mrs. Stuart and Mrs. Cunningham, and are still living. The testator left no widow. He had no real estate.

In this state of things, I have had, first, to consider whether the construction for which those who represent the estate of Mrs. Hay contend can be maintained, and I have been disposed to support that construction if possible, suspecting that the testator, if he could be consulted, would so interpret the instrument. But as Lord *Eldon* said, in *Bootle v. Blundell*(a), "The question is not what the testator really meant, (which can never be ascertained), but what he has authorised the Court to say it is probable was his meaning." And I think that here it would be taking too great a liberty with the language which the testator has adopted, and that it would be unsafe, to determine that he has authorised the Court to say that his meaning was probably in favour of Mrs. Hay to the extent alleged on behalf of her estate.

I must, therefore, though not very willingly, decide against that construction, and I must, for the same reason, (and also not very willingly), determine that what he gives by the words, "I give, devise, and bequeath the same unto the said Helen Stuart and Agnes Cunningham, and their several children, to be divided between them in equal shares and proportions," is given to Mrs. Stuart, Mrs. Cunningham, Mrs. Hay, and the five children of Mrs. Stuart equally, *per capita*, as tenants in common, so as to be divisible, therefore, in eighths—one belonging to Mrs. Stuart's estate, another to Mrs. Cunningham's estate, another to Mrs. Hay's estate, and the other five to Mrs. Stuart's five children.

But as two of the annuitants of £25 per annum each are

(a) 1 Mer. 237.

alive, the question remains (at least I have not meant what I have said as determining or covering the question), who are entitled to that portion of the income between the deaths of Mrs. Stuart and Mrs. Cunningham to which Mrs. Stuart would have been entitled if she had lived to the time of Mrs. Cunningham's death, and to the income (beyond the annuities or annuity of £25 per annum for the time being payable) from the death of Mrs. Cunningham to the death of the survivor of the three annuitants.

This part of the case especially has seemed and still seems to me to be not by any means free from difficulty. With respect to it, I have not omitted to consider *Bullock v. Stones* (a), (mentioned at the bar), *Shaw v. Cunliffe* (b), *Glanvill v. Glanvill* (c), *Ackers v. Phipps* (d), and other authorities.

But the language and provisions of this will, which are not of a common or usual kind, are, on the whole, such as to persuade me that there is a partial intestacy, namely, that the portion of the income between the deaths of Mrs. Stuart and Mrs. Cunningham, to which I have just been referring, and the income (subject as I have been mentioning) from Mrs. Cunningham's death to the death of the surviving annuitant, ought to be held to belong to the estates of Mrs. Stuart and Mrs. Cunningham as upon an intestacy. This is my ultimate impression; though I cannot declare that I am confident as to its correctness.

I think that I may say of this instrument, as Lord *Eldon* did of Mr. Blundell's will, that, could it "be referred to a number of lawyers they would probably entertain a diversity of opinion upon it;" but, as I may add, also in his words, "I cannot, by any consideration given to it, assist my mind, or prepare it for the decision of the question more than it is prepared already."

(a) 2 Ves. sen. 521.

(b) 4 Bro. C. C. 144.

(c) 2 Mer. 38.

(d) 9 Bligh, New Rep. 430.

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With respect to the conclusion of partial intestacy (which perhaps may be thought especially doubtful), it is to be observed, that, before making any one of the beneficial gifts made by the will, (except the bequests of 19 guineas each to the trustees for their trouble), the testator gives all his property to the two trustees (also his executors) in these words, "Upon trust, as soon after my decease as they conveniently can, to collect, get in, and convert the same into money by public or private sale, as they may think proper, and to invest the same (subject to the payment of the several legacies by me specifically bequeathed, and to the payment of my debts, funeral and testamentary expenses) in the purchase of some or one of the government stocks or funds of Great Britain, and to stand and be possessed of the same, and the dividends, interest, and annual income arising therefrom, and to pay and apply the same as by me hereafter directed, that is to say, in the first place, to pay all my just debts, funeral and testamentary expenses; and from and after payment thereof" the testator makes the bequests to Miss Lauremer and Miss Baker, and the bequest to Mrs. Stuart and Mrs. Cunningham, and their children. Now, the gift which I have said that I read as a gift to Mrs. Stuart and Mrs. Cunningham, and their children, as tenants in common, *per capita*, equally, became, as I apprehend, vested at the testator's death, though it would perhaps have comprised any child of either Mrs. Stuart or Mrs. Cunningham coming into existence after his death, had there been any such child. There was no contingency, or no other contingency. But the gift, as I think myself bound to interpret the instrument, was deferred in enjoyment until the decease of the survivor of the three annuitants. It is introduced by these words, "and from and after the death of the said Helen Stuart, the daughter Stuart and Elizabeth Cunningham;" and though he next says, "as to all the rest and residue of my said estate and effects, of

what nature or kind soever, and wheresoever situate," the general investment in the funds that he had previously directed must be recollected. There appears to me to be an exclusion from this final gift of such portions of the dividends previous to the death of the surviving annuitant as I have mentioned.

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Declare, that there was an intestacy as to the surplus income during the lives of the two annuitants, and that the residue is divisible, *per capita*, in eight shares.

On an appeal from the above decision, the *Lord Chancellor* held that there was no intestacy, and varied the decree in this particular accordingly.

1848.
June 14.

NOTT v. NOTT.

June 19.

GENERAL SIR WILLIAM NOTT, the testator in the cause, by his will, gave certain legacies to the plaintiffs, who were his daughters, and appointed his wife, Lady Nott, the executrix of his will.

Upon the testator's death, Lady Nott proved his will in the Prerogative Court of Canterbury.

The testator having died possessed of assets at Calcutta, letters of administration of his goods there were granted to Sir Thomas Turton, the registrar of the supreme court.

Part of the assets of a testator were in the course of administration in India by an official administrator appointed there. Before they were completely administered, a legatee's suit was commenced in this country against the

executrix, who had proved the will here, and who, after obtaining from the Master successive orders extending the time for putting in her answer, obtained one more order, giving her six weeks' further time. This order was made upon an affidavit of her solicitor, setting out a letter from the Indian administrator, who promised to remit the balance due from him by the next mail, and stating that the receipt of this balance and of the administrator's accounts were necessary to enable the defendant to put in a complete answer:—*Held*, that, although the Court might not itself have thought fit to grant the indulgence, the order ought not to be discharged. Principles on which the Court proceeds in reviewing the Master's decision on such points.

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 v.
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The two daughters filed their bill in August, 1846, against Lady Nott and Sir Thomas Turton, for the payment of their legacies out of the testator's assets, proceeding against Lady Nott alone, on the suggestion that Sir Thomas Turton was out of the jurisdiction.

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The plaintiffs amended their bill in January, 1847.

Several orders, enlarging the time for Lady Nott to answer the amended bill, were made by the Master.

This was a motion on behalf of the plaintiffs to discharge the last of these orders, dated the 2nd of June, 1847, which gave the defendant six weeks further time, and was made, on an affidavit of Lady Nott's solicitor, to the effect, that he received a letter from Sir Thomas Turton, stating that the latter had applied, without success, for a Government bill, to enable him to remit the balance of the testator's assets in his hands, but would remit the balance by the then next Bombay mail, or in the best way he could. The solicitor, in his affidavit, further stated, that, on the remittance of such balance, Lady Nott would be able to answer those inquiries in the amended bill which related to the assets of the testator in India, and the application thereof, and the amount which would, after the remittance of such balance, still remain due to the plaintiffs, and would also be able to raise such questions, with respect to the payment thereof, as might, under the advice of counsel, be necessary in the administration of the estate, but that none of such matters could be gone into until Sir Thomas Turton had administered the assets in India, and remitted the balance, with his accounts.

Mr. Russell and *Mr. W. M. James*, for the motion.

Mr. Bacon and *Mr. Eade*, for Lady Nott.

The VICE-CHANCELLOR:—

I am not by any means sure that, had I been in the place

of the learned Master, I should not have refused to allow the defendant the time that he has allowed her. A conclusion, however, formed by him on such a point, is as likely to be right as a conclusion by me; nor am I prepared to say that every sort of appeal from a Master ought to be decided according to the view which the judge before whom it comes may conceive that he should have taken of the case, had it come originally before him. Such a rule would possibly not square with a wise and discreet course of administering justice, to which it belongs not to foster or encourage frivolous or minute or captious litigation; and if in any case there ought to be a tendency rather to adopt than to dissent from an impartial opinion formed by a competent person, under the sanction of a judicial oath, that tendency may well be allowable, where, as here, the question is neither of law nor of practice, nor involving a disputed fact of any value, but is one merely of discretion, and that upon such a matter only as filing an answer to the amendments of a bill five or six weeks earlier or later, without one extraordinary circumstance or special reason for pressure.

Whether, to justify a practical difference of judicial opinion upon appeal, the case ought to be one of importance, either in the particular instance or in point of general principle, I will not say; but assuredly, where there is importance of neither sort, when the question is a *quæstiuncula* like this before me, a very clear case may with propriety be required.

If there is room for doubt here, the rule, *in dubio dicendum est præsumi pro sententiâ*, can never, I think, be much better applied. I doubt, and refuse the motion. Both parties having agreed to the terms which I have stated, that I considered reasonable, let the defendant's costs of it be costs in the cause.

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There may be circumstances under which the Court will, at the suit of universal legatees under a will, direct an account against a debtor to the testator's estate, without collusion being established between the debtor and the personal representative, or any evidence of insolvency on the part of the latter, or of his refusal to sue the debtor other than his omission to institute proceedings for a considerable period.

Quære, whether an honest refusal by an executor to institute a suit against a solvent person reasonably alleged to be equitably indebted to the testator, is sufficient of itself to enable the universal legatee of the testator to sue the debtor in equity, making the executor a party.

Quære, whether a party can read the cross-examina-

tion of the witness of his adversary where the latter does not read the examination in chief.

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SAMUEL BARKER was possessed at the time of his death of considerable personal estate, comprising a piece of ground held under a lease for the residue of a long term of years, with some erections and buildings, steam-engines, forges, furnaces, and machinery fixed upon the premises; the whole being vested in Charles Birch (a defendant), as a trustee for the testator. The testator was also possessed of stock in trade on the said premises. By his will, dated in September, 1832, the said Samuel Barker gave the whole of his property to his wife, Jane Barker, absolutely; and appointed her, and Charles Birch, and one William Lawson, executrix and executors of his will, which was proved, on January 29, 1833, by Charles Birch alone, who took upon himself the execution thereof, and possessed himself of the personal estate and effects of the testator to an amount much more than sufficient for the payment of his just debts and funeral expenses.

Neither Mrs. Barker nor Mr. Lawson ever proved the will.

Mrs. Barker, by her will, dated October 3, 1833, gave, devised, and bequeathed all her estate to Johanna Elizabeth Daniell and George Richard William, two of the defendants, who had since intermarried, in trust for the testatrix's six children, and appointed them executrix and executor of her will, and also left the six children to their care and guidance, appointing them guardians with Charles Birch and William Lawson. The testatrix died, November 19, 1833, leaving the plaintiffs, and Emma Clementina Barker, and Charles James Barker, her six children, her surviving. Emma Clementina Barker and Charles James Barker had since died, infants, and unmarried.

The defendants George Richard Hilliard and his wife proved Mrs. Barker's will.

Upon the death of the testator Samuel Barker, Charles Birch took possession of the whole of his personal estate, including the leasehold premises and the steam-engine plant, utensils, and stock in trade, and got in the debts due to the testator to a considerable amount, and carried on the business of the testator, as an iron manufacturer, on the premises, and received considerable profits therefrom. He afterwards sold, and received considerable sums of money for the leasehold premises, steam-engine, plant, utensils, and stock in trade.

The present suit was instituted in 1839, on behalf of the surviving children of Mrs. Barker, against Mr. Charles Birch, Mr. Lawson, Mr. and Mrs. Hilliard, and the administrator of the deceased children, stating that Mr. Birch had in his hands a considerable portion of the testator's estate remaining undisposed of, and that the plaintiffs had frequently requested Mr. Birch and Mr. Lawson to come to a full and true account with the plaintiffs, or with G. R. Hilliard and his wife, for the personal estate and effects of the testator Samuel Barker, and to pay and secure the clear residue thereof to or for the benefit of the plaintiffs, with which request the plaintiffs well hoped that the defendants Birch and Lawson would have complied, but that they had refused so to do, and that the plaintiffs had requested the defendants Hilliard and his wife to require the defendants Birch and Lawson to come to an account with them for the personal estate of the said testator, and to pay and deliver the residue thereof unto them for the benefit of the plaintiffs, but that the defendants Hilliard and his wife, colluding with the defendants Birch and Lawson, severally refused to require them so to do, and refused to take any proceedings against them for the purpose of obtaining such account, or for compelling payment, or delivery of the residue of the said testator's personal estate; and that, to give some

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colour of justice to such refusal, the defendants Birch and Lawson sometimes pretended that the personal estate and effects of the said testator were small and inconsiderable, and not more than sufficient to pay and satisfy his debts and funeral expenses, and that they had applied all such personal estate and effects in a due course of administration; whereas the plaintiffs charged the contrary to be true. The prayer was, that it might be declared that the defendant Birch was a trustee for the testator Samuel Barker, of the leasehold property and premises, and (if necessary) that it might be declared, that the sale was a fraudulent contrivance of the defendant Birch, and void; that an account might be taken of the personal estate and effects of the testator, Samuel Barker, which had, or, but for the wilful default of the defendants Birch and Lawson, or either of them, might have come to their hands, including the leasehold premises, plant, stock in trade, &c., and also an account of the profits derived by the defendant Birch from continuing and carrying on the testator's business; also an account of the testator's debts and funeral expenses; and that the testator's personal estate might be applied in a due course of administration; and that the defendants Birch and Lawson might be decreed to pay what might be found due from them.

Mr. and Mrs. Illiard by their answer said, they believed it to be true, that Mr. Birch possessed himself of the personal estate and effects of the testator to an amount much more than sufficient for the payment of his just debts and funeral expenses, and they believed that neither J. Barker nor W. Lawson ever proved the will of the said testator. They said, they had been informed, and believed, that Mr. Birch carried on the business of the testator on the premises up to or about the time in the bill mentioned; and that he did on or about the same time sell the same; and they believed that Mr. Birch had made and received very considerable profit from carrying on the testator's trade,

and had sold and received considerable sums of money for the leasehold premises, steam-engine, plant, utensils, and stock in trade, and removed some part or parts thereof from the said premises at the time of the sale, but whether he had, out of such receipts, a long time since or ever, paid or satisfied all the just debts, funeral and testamentary expenses of the testator, they were unable to set forth, as to their knowledge, information, or belief; but they had been informed, and believed, that he had in his hands a considerable sum of money arising from the said testator's estate, and a considerable portion of the said testator's estate remaining undisposed of; and they believed that some persons, on behalf of the infant complainants, but not the plaintiffs themselves, had, though not frequently, requested Mr. Birch to come to a full and true account with the plaintiffs, or with these defendants, for the personal estate and effects of the said testator Samuel Barker, and to pay and secure the clear residue thereof to or for the benefit of the plaintiffs; and that Mr. Birch refused to comply with such request. And they admitted that the plaintiffs had requested them to require Mr. Birch to come to an account with them for the personal estate and effects of the testator Samuel Barker, and to pay and deliver the residue thereof unto them for the benefit of the said plaintiffs; and they admitted that they refused to require Mr. Birch so to do, and that they refused to take any proceedings against him for the purpose of obtaining such account, or for compelling payment or delivery of the residue of the said testator's personal estate, because they were desirous (if possible) of getting in and applying the estate for the benefit of the infant plaintiffs, without a suit in equity for that purpose; and they said, that they had still, and had ever since the decease of Mrs. Barker had the care and custody of the infant plaintiffs. And at the end of their answer they said, that they were ready and willing to act in the premises under the direction of the Court, upon being paid their

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costs. The defendant Birch in his answer denied collusion, and stated that the testator's estate was insolvent, and that the sale had been fair and proper. The defendant Lawson's answer stated that he had never acted as executor.

Mr. *Kenyon Parker*, Mr. *Bacon*, and Mr. *Willcock*, for the plaintiffs.—In *Burroughs v. Elton* (a) it was held, that a creditor might sue in equity persons accountable to the estate, when the executor had become bankrupt and refused to get in the assets; and in *Lancaster v. Evors* (b), where the point was fully discussed, the Master of the Rolls said, that the circumstance of the refusal of the executors to recover the only assets would make the case an exception to the general rule. They also cited *Bowsher v. Watkins* (c).

The VICE-CHANCELLOR referred to *Alsager v. Rowley* (d), and *Bechley v. Dorrington*, cited in that case.

Mr. *Russell*, Mr. *Heathfield*, and Mr. *Haddon*, for the defendant Birch.—A legatee cannot sue a debtor to the estate without proving collusion between him and the personal representative, or the insolvency of the latter: Mitford on Pleading, 158, *Ullerson v. Mair* (e), *Troughton v. Binkes* (f), *Elmslie v. Macaulay* (g), *Baddeley v. Curwen* (h). They also referred to *Davies v. Davies* (i), *Holland v. Prior* (k). In this case there is no evidence even of such refusal. And it was expressly decided in an unreported case, that neglect on the part of the executor was not enough if he was solvent.

(a) 11 Ves. 29.

(b) 4 Beav. 165.

(c) 1 Russ. & Myl. 277.

(d) 6 Ves. 748.

(e) 2 Ves. jun. 95.

(f) 6 Ves. 573.

(g) 3 Bro. C. C. 624.

(h) 2 Coll. 151.

(i) 2 Keen, 539.

(k) 1 Myl. & K. 240.

Mr. *Wigram* and Mr. *Speed*, for the defendant *Lawson*.—If it be established that a mere refusal to sue on the part of the legal personal representative is sufficient to enable a legatee to proceed against a debtor to the estate, the result will be, that, where the demand is legal, the circumstance of the executor declining to enforce the demand will convert an action into a suit in Chancery. Surely the debtor would have a right to object to such a consequence. There is a known and established practice in all such cases, which is quite free from any such difficulty. The legatee files his bill against the personal representative; and if he establishes a proper case, a receiver is appointed, and there is a reference to the Master to inquire whether the proceeding, either at law or in equity, which the legatee alleges, ought to be instituted, but which the legal personal representative declines commencing on his own responsibility, will be beneficial to the estate; and if the Master finds that it will be, the proceeding is taken in the name of the legal personal representative under the indemnity of the Court. The passage cited from the judgment of the Master of the Rolls in *Lancaster v. Evors* (a), is extra-judicial. In *Elmslie v. Macaulay* (b), which was a bill by creditors of a testator against persons having assets of the testator, the Master of the Rolls said: "It is impossible to maintain such a bill, except in the case where there is a collusion of the executrix with the person who is possessed of the fund." [*The Vice-Chancellor*.—But the Master of the Rolls adverts to the circumstance of the executrix having sworn, by her answer, that she was never called upon to pursue the effects till after the bill was filed. One question would be, whether a refusal to sue was equivalent to collusion?] It has never been so held. [*The Vice-Chancellor*.—Then, is the circumstance of the insolvency of the personal representative sufficient to take a case out of the general

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(a) 4 Beav. 165.

(b) 3 B. C. C. 626.

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rule?] Your Honor has held, in *Baddely v. Curwen* (a), that insolvency alone is not sufficient. [*The Vice-Chancellor* said he did not consider any such point to have been decided in the case referred to; and that if Lord Eldon had said, in *Burroughes v. Elton* (b), which was not cited in *Baddely v. Curwen* (c), that insolvency was sufficient, it was immaterial to look to the latter case upon that subject.] The circumstance of insolvency is very different from that of a mere refusal to sue, because, if the executor has become insolvent, he is no longer a proper party to get in the assets. [*The Vice-Chancellor*.—What has the debtor to do with that?] As to *Bowsher v. Watkins* (d), which is cited on the other side, the Master of the Rolls, in *Davies v. Davies* (e), said: "It has been said, in the course of the argument, that, in a suit constituted as this is, against the executor and surviving partner of the testator for an account of the partnership transactions, it was not necessary to prove the fraud and collusion which were charged in the bill; and the case of *Bowsher v. Watkins* was cited in support of that proposition. I well recollect that there were special circumstances which induced Sir John Leach to come to the conclusion he did in that case, and that the decision was very far from establishing the general proposition, that, in every case, a bill must be filed against an executor and surviving partner of the testator without charging and proving fraud or collusion."

Mr. Shapter and Mr. J. Jervis appeared for other defendants.

Mr. Kenyon Parker, in reply, said that all that was necessary was to shew special circumstances, which were not

(a) 2 Coll. 151.
 (b) 11 Ves. 25.
 (c) 2 Coll. 151.

(d) 1 Russ. & Myl. 277.
 (e) 2 Keen, 539.

confined to those of collusion or insolvency, as had been contended. He referred to *Newland v. Champion* (a), *Law v. Law* (b),—[*The Vice-Chancellor*.—In that case, had not the executors disabled themselves from asserting their rights in that character?]*—Consett v. Bell* (c), *Franklyn v. Ferne* (d), *Lautour v. Holcombe* (e), and *Benfield v. Solomon* (f).

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Mr. *Russell* referred to *Kaye v. Fosbrook* (g), and said, with respect to what had fallen from the Court as to *Burroughes v. Elton* (h), that, in that case, the bill claimed an equitable right; and that the creditor was entitled, independently of the point now in question, to bring before the Court the party having the equity, as well as the party having the legal estate.

The VICE-CHANCELLOR, observed, during the argument, that Lord *Eldon* would hardly have spoken with so much caution and particularity as to collusion in *Alsager v. Rowley* (i), if a mere refusal to sue would have been sufficient.

The VICE-CHANCELLOR.—In this cause, instituted in the year 1839, there are three bills; namely, the original bill, four times amended, a bill of revivor and supplement, and a bill of revivor.

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The original plaintiffs were Jane Elizabeth Barker, Frances Ellen Barker, Samuel Barker, and William Henry Barker, suing as four of the six universal legatees of their mother, Jane Barker, who died in 1833. The other two (who were dead) were represented by their grandfather, Mr.

(a) 1 Ves. sen. 106; and see extracts from the record in that case, 2 Coll. 46.

(b) 2 Coll. 41, affirmed on appeal, see 11 Jur. 463.

(c) 1 Y. & C. C. C. 569.

(d) Barn. 30.

(e) 8 Sim. 81.

(f) 9 Ves. 77.

(g) 8 Sim. 28.

(h) 11 Ves. 25.

(i) 6 Ves. 748.

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Francis Daniell, formerly, if not at present, a defendant, and are now represented by their sister, Jane Elizabeth Barker, already mentioned. She is made a defendant to the second and third bills.

When the suit was commenced, all the plaintiffs, I believe, were infants,—the two young men are infants, I believe, still,—the next friend is and was originally a lady named Elizabeth Wills. She became, I think in 1846, and is now, the personal representative of Frances Ellen Barker, who died in that year.

Miss Wills having become, in that character, a plaintiff in the third bill, the present plaintiffs are, therefore, three, besides Jane Elizabeth Barker, whom, being a defendant to the second and third bills, it may, or may not, be right still to consider as a plaintiff.

The testatrix Mrs. Barker appointed the defendant Mr. Hilliard, and Miss Daniell, formerly a defendant, her executors. They both proved her will. Miss Daniell was then single, but afterwards she married her co-executor, Mr. Hilliard, and died, I think, shortly after answering the original bill. The testatrix Mrs. Barker was the widow and universal legatee of Mr. Samuel Barker, who died in 1832, having, by his will, appointed her and Mr. Birch and Mr. Lawson, who are defendants, his executors. Of these, Mr. Birch alone proved the will. He did so in Mrs. Barker's lifetime. It is, I think, shewn by the evidence that Mr. Lawson, without proving the will, acted, to some extent, as one of the executors of the testator Samuel Barker, though to a less extent than Mr. Birch.

I collected, partly from what was stated in court, and, as I understood, admitted during the argument, and partly from the evidence, that Mrs. Barker, Mr. Hilliard, and a lady named Harris, were sisters, and were the nieces of the plaintiff Miss Wills; and that, from the commencement of the litigation, and throughout the cause, Mr. Harris (a witness for the plaintiffs,) the husband of Mrs. Harris, has

been the solicitor of the plaintiff for the time being, and also of Mr. Hilliard, and, while Mrs. Hilliard was living, of that lady too. Mr. Hilliard has been examined as a witness for the plaintiffs, and also for Mr. Lawson. His evidence for the plaintiffs has been read, and so, I believe, has been the rest of his evidence. He appeared by counsel at the hearing, and, if he did not support, did not oppose, the relief asked by the plaintiffs' counsel.

The object of the litigation was originally, and still is, to charge Mr. Birch and Mr. Lawson with breaches of trust alleged to have been committed by them respectively as executors of the testator, Samuel Barker, to obtain an account from them of his personal estate, and an administration of it, to compel them to pay sums alleged to be due from them in respect of it; and that the amount, when paid, may be secured, as the first bill says, for the benefit of the original plaintiffs, "according to their respective rights and interests therein."

Right or interest they had not, however, and cannot, I suppose, have any, unless in the case of a surplus of the personal estates of Mr. and Mrs. Barker respectively, after paying their respective debts and funeral and testamentary expenses: how that may be I do not know; but, subject to any question that it may be possible to raise as to the fund collected by subscription from persons benevolently disposed towards Mr. Barker's family, and, as to the allowance of £70 per annum mentioned in the pleadings and evidence, it does not appear, nor has it been alleged on the record or at the bar, that Mrs. Barker had or was entitled to any property, or any except her husband's property, or that any personal estate of hers, of any kind, howsoever derived, was possessed by Mrs. Hilliard, or has been possessed by Mr. Hilliard, or that Mrs. Barker's estate, if any, was clear or is solvent; and, subject to the observation that there is on the record a prayer, in the ordinary form, as I suppose, for general relief, neither any administration of

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Mrs. Barker's personal estate, nor any account against Mrs. Hilliard or Mr. Hilliard, or relief against either of them, is prayed, or was, at the bar, asked.

The right decree, however, to be made, if the objection to the suit taken and argued on behalf of Mr. Birch and Mr. Lawson, for the purpose chiefly, if not solely, of considering which I delayed the judgment, and of which I have now to dispose, is unfounded, is not, upon the pleadings and evidence, I think, of much, if any, difficulty or embarrassment in point of principle; though, whether slight or simple in point of detail, or whether of facility or cheapness in the execution, is a different question.

The objection that I have just mentioned is this: that whether the estate of the testator or the estate of the testatrix has or has not any just demand upon Mr. Birch and Mr. Lawson, or either of them, there did not in the original plaintiffs, and does not in the present plaintiffs, exist any right of suit against either of those two defendants, who say, that, if anything is due from either of them, (which they deny,) they ought to have been sued, if at all, by Mr. Hilliard and his deceased wife, or by one of them; that a special case only could warrant a different course, and that such a special case is not proved. Against and in support of this objection (which did not prevent the entire case from being gone through), there was an argument of some, not too great, length; and the report of *Elmslie v. Macaulay*, and various other decisions before and after it (including *Alsager v. Rowley* and *Burroughes v. Elton*), were cited. At these, and into the papers in the cause, I have, since the argument, looked.

The plaintiffs' counsel admitted substantially, and I think correctly, that if A. be the universal legatee, and B. the sole executor of C., to whom, at his death, D. was indebted equitably in a sum known to be considerable, but not of ascertained amount, for which D., still owing the money, is liable to be sued by B., it is not as a matter of

course competent to A. to file a bill in equity against B. and D., for the purpose of compelling D. to pay the debt. It was not, nor could it correctly, I think, have been, denied, that, to justify or enable such a suit, there must be a case of particular circumstances.

The plaintiffs' counsel contended, however, that a case sufficient to sustain the bills in the present instance is alleged on the record, and proved against Mr. Birch and Mr. Lawson, whose contention I have stated to be, that such a case is not proved.

As concerning the allegation in this respect, the plaintiffs' counsel seemed to rely chiefly, if not altogether, on the following passage contained in the first bill. (His Honor read the passage, set out above.)

Now of a refusal by Mr. Hilliard or his wife to sue, or of any collusion on the part of either of them with Mr. Birch or Mr. Lawson, there is not any the least proof, unless so far, if at all, as proof of a refusal or of collusion ought to be considered as afforded by the three circumstances that I am about to mention: the first being, that Mrs. Barker having died in 1833, a suit has never been instituted by Mr. Hilliard or Mrs. Hilliard; the second, that their answer, which it has been insisted cannot be used against Mr. Birch or Mr. Lawson, contains these passages. [His Honor read the passages, set out above, from the answer;] the third, that there has been produced an exhibit, proved, and only proved, by an affidavit shewing it to be in Mr. Hilliard's handwriting, as to which the counsel for Mr. Birch and Mr. Lawson have contended, that it is not, against them, to be assumed or inferred that the paper left the hands of Mr. Hilliard, or was written, before the commencement of the suit. The exhibit is in these words:—
 "1, Stockwell-place, January 18, 1839." (It is addressed to Mr. Harris, the solicitor and uncle in-law, I think, of the original plaintiffs.) "My dear sir,—Under all circum-

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stances, and after giving some time to consideration, I feel disinclined to proceed in any suit against Mr. Birch on behalf of the children; and therefore I beg you will not take any further steps on my account, nor consider me in any way liable to you."

Now if the question, whether it is right that the bills should at this stage of the suit be dismissed, ought to be considered as one turning merely on the existence or non-existence of proof against Mr. Birch and Mr. Lawson of actual refusal to sue, or collusion, in fact, on the part of Mr. and Mrs. Hilliard, or either of them, I am very far indeed from sure that the bills ought not to be now dismissed. But after having employed my mind as much as I think it can be usefully employed upon the matter, I am not satisfied that the question of present dismissal does so turn. My impression is, that the plaintiffs are entitled upon this record to raise the point, that, assuming an actual refusal to sue not to be proved,—assuming collusion, in fact, also not to be proved—there is a case of circumstances entitling them to a decree.

But neither upon the pleadings nor upon the evidence, neither upon principle nor upon authority, have I been able to bring myself to view the question, whether, supposing an actual refusal by Mr. and Mrs. Hilliard, or either of them, to sue, to have been or not to have been sufficiently proved, the plaintiffs are entitled to a decree, as a question free from great difficulty. Nor has this been from want of endeavour on my part. I have not, as I believe, given way to the temptation to carelessness (with regard especially to an obscure or a complicated question), which, when there is a strong persuasion in a judge's mind, that, whatever his decision is, there will assuredly be an appeal to another Court, may be thought not unlikely to assail him. In truth, in this instance, at the present stage of the matter, the substantial point, though involving possibly costs of some amount, is probably little if anything more than whether

Mr. Birch and Mr. Lawson shall be appellants or respondents in the next. A temptation, however, from which I am less positively sure that I have succeeded in wholly escaping, has been afforded probably by the consideration, not merely of the time already consumed in this litigation (why I know not,—it began in January, 1839), but also of the very heavy expense on the part of the plaintiffs especially, though not on the part of the plaintiffs solely, which, in preparing and amending bills, preparing and procuring evidence, and bringing the suit up to its full bulk—(I am the present possessor of more than 300 sheets of pleadings, interrogatories, and depositions, which fell to my lot for private reading, if I should think it necessary: I had but one of the exhibits), must have been incurred; all which will be thrown away, or nearly so, I suppose, if these bills shall be dismissed,—an observation, however, if relevant, not to be made without remembering, that, possibly (I do not say whether probably), neither Mr. Lawson nor even Mr. Birch may be found to owe a shilling to the estate of Mrs. Barker, or to that of the testator.

The conclusion at which, in a choice, as it seems to me, of difficulties, I have arrived, is, that, whether there is or is not proved to have been previously to the first bill an actual or express refusal on the part of Mrs. Hilliard to sue,—whether, in general, an honest refusal by an executor to institute a suit against a solvent person, reasonably alleged to be equitably indebted to his testator, is sufficient or insufficient of itself to enable the universal legatee of that testator to sue the debtor in equity, (if he is equitably indebted), making the executor also a defendant,—there do upon the pleadings and evidence in this particular case appear special circumstances sufficient to warrant the suit,—that is, to render it not incumbent on the Court to refuse the relief, which, at the hearing, I stated would, in my judgment, probably be the right relief, if I should not at this

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stage dismiss the bills; and this, on the whole, as I have said, though after great hesitation, and with great doubt, I decline to do, making instead a decree, which (though, in that event, I think it a right one) may probably, I fear, be of burthensome and expensive execution, and may very possibly not be productive in the end of solid advantage to any of the parties to the cause, of whom not one, I suppose, has yet gained anything by it or from it, though I am speaking in the ninth year of its existence, or is likely, in the ordinary course of things, to do so before it shall have attained a much maturer age.

I have not considered it necessary to state particularly the parts of the answers of Mr. Birch and Mr. Lawson, and the various facts, together forming the combination of circumstances, upon a view of which I have thought this course the safer and more probably correct course to take. But I may refer, as a portion at least of that body of circumstances, to the time, not I think more than fifteen or sixteen months, that passed between the deaths of Mr. and Mrs. Barker to the time—more, I believe, than five years—that passed between her death and the commencement of the suit, to the appointment, however ineffectual legally, by her will, in words, of Mr. Birch and Mr. Lawson to be her children's guardians, together with Mr. and Mrs. Hilliard, to the allowance of £70 per annum, commenced, as I understand the matter, in Mr. Barker's lifetime, but continued after her death, to the probability, at least, that her only property was such interest in her husband's personal estate as she was entitled to claim under his will; the correspondence of 1838, in which the children are pointedly noticed; the manner in which they appear, in the interval between their mother's death and the year 1839, to have been considered and treated as interested; and the particular dealings relating to the testator's property, which, obscure in some respects in their nature, appear to have taken place.

The minutes of the decree were as follows, so far as regards the points in question:—

Refer it to the Master to inquire under what circumstances the indenture of 14th January, 1832, was prepared and executed, and by whom, and out of what funds, and on whose account, and under what circumstances, the consideration-money therein mentioned was provided and paid.

Refer it to the Master to take an account of all dealings and transactions between Barker and Birch in the lifetime of Barker, and let the Master state what, if anything, was, at Barker's death, due from Barker to Birch, or from Birch to Barker; then direct the common administration account and inquiries as to Barker's personal estate, debts, &c.

Let the Master inquire and state whether any trade or trades in which Barker, at his death, was engaged were or was continued after his death, and by whom, and how long, and under what circumstances, and whether any and what part of his assets was, after his death, used and employed in and for the purposes of any and what trade or trades, business or businesses, and under what circumstances, and whether, after his death, any and what part of his effects and property was sold to the Upton Company, and when, and by whom, and for what price or consideration, and under what circumstances, and whether the property and effects, if any, so sold, or any and what part thereof, was or were afterwards purchased by Birch, and for what price or consideration, and under what circumstances, and whether the testator's widow, in her lifetime, after the testator's death, assented to the acts

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of Birch, and the acts, if any, of Lawson in the administration or management of the testator's estate, and in relation to the trade or trades which had been carried on by the testator, or any and what of such acts, and under what circumstances.

And let the Master be at liberty to state any circumstances specially with respect to the allowance of £70 per annum, or any other matter, and reserve further directions, with liberty to apply.

The accounts to be the usual administration accounts against Birch and Lawson, not including the words "wilful default."



June 19.

WILLES v. LEVETT.

The circumstance that a mortgagee, with power of sale, has entered into a contract to sell a portion of the property comprised in the security for a sum greater than the amount due on the mortgage:—
Held, not a sufficient ground for restraining him from prosecuting an action upon the covenant for payment contained in the mortgage-deed.

MR. RUSSELL and *Mr. Hislop Clark* appeared on behalf of the plaintiff, to shew cause, on the coming in of a defendant's answer, against dissolving a common injunction, obtained under the following circumstances, as they appeared from the answer of Miss Levett, the defendant, now seeking to have the injunction dissolved.

A mortgage had been made to a trustee for Miss Levett of an estate belonging to the plaintiff, called the Beltingham estate. The mortgage-deed contained a trust of sale and the usual covenant with the trustee for payment of the mortgage-money.

On September 22nd, 1846, a portion of the estate was, by Miss Levett's direction, put up for sale by public auction, when Mr. Thomas Grant, another defendant, having bid £2,410, was declared to be the purchaser, and immediately afterwards paid into the hands of the auctioneer £482, being a deposit of £20 per cent. upon the pur-

chase-money, and signed an agreement for completing the purchase and paying the residue of his purchase-money on the 20th of December then next.

After the sale had taken place, the purchaser's solicitors applied on behalf of the defendant Grant for an abstract of the title, and Miss Levett stated, in her answer, that she had no doubt but that the defendant Grant would have completed his purchase but for the conduct which had been pursued by the plaintiff in reference thereto. The plaintiff, however, had requested the defendant Grant to abandon his purchase to enable the plaintiff to pay off the incumbrances on the estate, and Mr. Grant had agreed to do so, if Miss Levett would consent to an arrangement for that purpose. A correspondence consequently took place, and Mr. Grant's solicitor, on the 3rd of December, 1846, wrote a letter to Miss Levett's solicitor, which, after stating that the plaintiff was making every endeavour to raise a sufficient sum to pay off all incumbrances, proceeded as follows:—"If he can do this, Mr. Grant would, we think, be willing to forego his purchase for his (Willes's) benefit; and to this, we presume, you would have no objection, provided you receive the whole of your money. Under the above circumstances, we have given Mr. Willes a fortnight to endeavour to raise the money, and have promised not to incur any expense in the meantime. If we go on with the purchase, we shall probably not require to examine the abstracts at all, as, we presume, they are merely copies of what we already have in our possession." Miss Levett, however, declined to accede to any arrangement, except upon payment of the balance due to her on her mortgage; and, after some time, instructed her solicitor to take all proper steps to enforce her securities, and to complete the sale to Mr. Grant.

On the 15th of January, 1847, her solicitor, accordingly wrote a letter to the plaintiff's solicitors, requiring possession to be delivered of the Beltingham estate; and after-

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wards an action of covenant was commenced, at her request, in the name of her trustee, against the plaintiff for recovering the balance due from the plaintiff on the mortgage, as well as an action of ejectment.

To the action of covenant, the plaintiff pleaded the general issue; and the action was tried in the Spring Assizes, 1847, when a verdict was obtained for the amount of principal and interest due to the defendant, but which was less than the sum agreed to be paid to Grant for the purchase of the estate.

The plaintiff then filed the present bill against Miss Levett, her trustee and some puisne incumbrancers, impeaching the validity of the sale on various grounds, into which it is unnecessary to enter, as none of the facts alleged by the bill, with respect to this part of the case, were admitted by the answer. The prayer of the bill was, that it might be declared, that the sale of the Beltingham estate was fraudulent and void, or was null and void as against the plaintiff, and ought to be set aside, and that the same might be set aside accordingly, and that the plaintiff might be let in to redeem, or that the Beltingham estate might be resold under the direction of the Court, and that, out of the produce of such sale, after defraying the expenses thereof, the defendants, the mortgagees respectively, might be paid what should be ascertained to be due to them on foot of their said several securities, the plaintiff thereby offering and submitting, in the event of such re-sale not producing sufficient to answer and satisfy what should be ascertained to be due to the defendants, the mortgagees, to pay and satisfy the difference necessary for that purpose; and that the defendants Ann Levett and Thomas Grant, and their solicitors and agents, might be restrained from proceeding with the sale, and from taking any steps to enforce or complete the same, and from attempting to gain possession of the Beltingham estate for the defendant Grant; and that Miss Levett and her trustee, and their respective solicitors

and agents, might be restrained from further proceeding in the action. A common injunction had been obtained in these terms for want of answering; and, in support of it, the plaintiff's counsel now cited *Perry v. Barker* (a), *Schoole v. Sall* (b).

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The VICE-CHANCELLOR, without calling on the counsel for the defendants:—

This is a simple case, and, as I understand it, is thus:—There is a mortgagee with a power of sale, and a considerable sum remains due upon the mortgage, subject to what I am about to state. The mortgagee has exercised her power of sale, to the extent of entering into a contract to sell a portion of the property comprised in the security. The purchase has not yet been completed, a deposit having only been paid, which is now in the hands of the auctioneer. Under these circumstances, the mortgagor files a bill against the mortgagee and the purchaser, impeaching the validity of the sale, on grounds which seem plausible, and seeking to set it aside, the mortgagee and the purchaser insisting that the sale is good. In that state of things (the purchase-money being greater than the debt), it is contended that the Court ought to restrain the mortgagee from suing on the covenant for the money due upon the mortgage. I am disposed to wish that I could accede to the application; but were I to do so, I should, I fear, be making, and not administering, the law of the Court. That law, I think, does not enable me to interfere, and the injunction must be dissolved.

Ordered accordingly.

(a) 8 Ves. 527; 13 Id. 198.

(b) 1 Sch. & Lef. 176.

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June 24th.

SKEY v. GARLIKE.

More than twelve days after bill filed, a defendant filed a pleading, which was a demurrer, and also an answer to the whole bill:—*Held*, that, notwithstanding the 37th Order of Aug. 1841, the answer overruled the demurrer, and that it was not necessary to move to take the pleading off the file as irregular.

THE bill was filed on March 25, 1847. On June 3, 1847, a defendant named Thomas Garlike filed a pleading, intitled "The Demurrer and answer of Thomas Garlike, a defendant," &c., and purporting to be a demurrer to the whole bill, as well as an answer to the whole bill.

The demurrer now came on to be heard.

Mr. *Swanston* and Mr. *Southgate*, for the plaintiff, objected that the demurrer was overruled by the answer.

Mr. *E. G. White*, in support of the demurrer.—The demurrer must be argued on the merits. If the plaintiff had any objection on the ground of irregularity, he should have made it the subject of an application to take the pleading off the file. But it is not irregular, being not a demurrer only, but a demurrer and answer. Nor can the plaintiff object to the demurrer and answer being each to the whole bill, for the 37th Order of August 26th, 1841, provides that a demurrer shall not be overruled because the answer may extend to some part of the same matter as may be covered by the demurrer.

The VICE-CHANCELLOR was of opinion, that, if such proceeding could be permitted, the 16th Order of May, 1845, Art. 10 and 13, would be of no effect; and said, the only question was, whether it was necessary for the plaintiff to move to take the pleading off the file. His Honor thought not, and overruled the demurrer.

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June 2nd.

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CLIVE v. BEAUMONT.

THIS was a suit for the specific performance of an agreement for the sale, to the defendant, of a leasehold house in Grafton-street, Berkeley-square, belonging to the plaintiff. The agreement relied upon was to be collected from the following negotiations and correspondence:—

The plaintiff, who was the executor of Edward Bolton Clive, the original lessee, in the month of August, 1845, gave directions to Messrs. Snell, house-agents, to sell the house, with the furniture and fixtures.

On the 20th of October, 1845, the defendant inquired of the agents as to the terms; and they thereupon informed him that the terms asked were £250 a year rent, and £1000 for the furniture and fixtures.

The defendant, on the 20th of October, viewed and inspected the premises; and on the 27th of October, 1845, he sent to Messrs. Snell the following letter, dated the 27th of October, 1845:—

“Gentlemen,—I am willing to take the remainder of Mr. Clive’s term of No. 18, Grafton-street, at the same rent, and will purchase the fixtures and furniture, to the amount of £100, by valuation, in the usual way, the furniture to be selected by myself.

“I am, Gentlemen, yours, &c.,

“HENRY BEAUMONT.”

To this letter, Messrs. Snell returned the following answer, dated the 30th of October, 1845:—

and other matters, but does not require production of the landlord’s title, he will be considered to have waived its production.

Semble, that a decree for specific performance should not declare that the agreement ought to be performed, if a good title can be made.

A proposal by a purchaser to take the remainder of a lease was answered by a letter, which, after acceding to the proposal, added, “We hope to give you possession at half-quarter day:”—*Held*, that the addition did not introduce a new term, but that the acceptance was unconditional.

It is not sufficient for a party, who intends to rely upon a waiver of title, to allege upon his pleading the facts constituting the waiver; he must shew how he means to use the facts, by alleging that the title has been waived thereby.

Semble, that where the purchaser, after transmission to him of the original lease, prepares a draft assignment, and makes various objections as to repairs

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“ Sir,—We are instructed by our principal, the Rev. Archer Clive, to accept the terms proposed by you, in your letter of the 27th ult., for his house, No. 18, Grafton-street. We hope to give you possession by the half-quarter day.

“ We are, Sir, your obedient servants,

“ W. & E. SNELL.”

On the 9th of December, 1845, Messrs. Snell transmitted to the defendant, who was himself a solicitor, the lease of the premises, which was dated the 13th of November, 1830, and was made between one William Michael Tollner of the one part, and Edward Bolton Clive of the other part, whereby Mr. Tollner demised unto the late Mr. Clive, his executors, administrators, and assigns, the premises in question, for twenty-one years, from the 25th of December, 1831, determinable at the end of the first seven or fourteen years of the term, at the option of Mr. Clive, his executors, administrators, or assigns, at the clear rent of £250 per annum.

After receiving the lease, the defendant wrote to Messrs. Snell the following letter, dated the 17th of December, 1845:—

“ Gentlemen,—I have been confined to my bed for the last week, or should have written to you to complete the arrangement as to Grafton-street. Please to let me know the name of Mr. Clive’s solicitor, and I will forward him the draft assignment. I hope to be able to take possession a day or two after Christmas.

“ I am, &c.,

“ HENRY BEAUMONT.”

On the 27th of December, Messrs. Whitmore & Co. (the plaintiff’s solicitors) received, from the defendant, the draft of an assignment from the plaintiff to the defendant, accom-

panied by the following letter from the defendant to Messrs. Whitmore & Co., dated the 26th of December, 1845:—

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“Rev. A. Clive and self.

“Dear Sirs,—I beg to forward, for your perusal, on behalf of your client, Mr. Clive, the draft of the assignment, from him to me, of a lease of No. 18, Grafton-street. Some of the covenants appear to have been departed from, but I suppose a waiver can easily be obtained from the landlord in respect of these.

“I am, &c.,

“HENRY BEAUMONT.”

On the 27th of December, the defendant wrote to Messrs. Snell the following letter:—

“Gentlemen,—I shall be prepared to take possession of No. 18, Grafton-street on Monday next, and will be there at eleven o'clock on that morning for the purpose, if convenient to you.

“I remain, &c.,

“HENRY BEAUMONT.”

A clerk of Messrs. Snell, named Jay, accordingly attended on the Monday mentioned in the last letter, and, in the course of conversation, requested the defendant to give a cheque for the furniture and fixtures, but the defendant declined so to do unless a deduction was made on account of repairs.

The bill, after stating to the foregoing effect, alleged, that, among other pretences, the defendant pretended that the plaintiff had agreed to put the house into repair. The bill charged the contrary to be true, and stated various conversations to shew that the defendant agreed to take the house as it stood, and himself to perform all necessary re-

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pairs. The other points raised by the charging part of the bill were, the fact of the agency of Messrs. Snell, and a denial of an alleged pretence of the defendant that the contract was conditional, upon the defendant being able to procure from the landlord an extension of the term. The bill also charged, that the defendant had, on several occasions, treated and considered the agreement as a binding agreement; and, in proof thereof, that the defendant, on the 30th of January, 1846, sent to the plaintiff's solicitors a letter, saying, "I shall be glad to know whether you will undertake to appear for Mr. Clive to the proceedings I shall immediately institute for enforcing the contract between us." The bill also charged, that the defendant considered himself bound, under the agreement, to take an assignment of the premises as from Christmas, 1845; and, in proof thereof, the bill charged that the defendant had, in the letter of December 17th, 1845, expressed his hope to be able to take possession at Christmas, but the production of the landlord's title was not stated or charged to have been demanded or waived, nor was there any statement or charge on that subject in the bill.

The case set up by the defendant's answer was, that there was no positive and absolute agreement;—that, when the defendant entered into the negotiation, he was unacquainted with the stipulations contained in the lease, and particularly with certain stipulations as to repairs, and a prohibition against any auction taking place on the premises;—that the former of them had not been performed at the time of the commencement of the negotiation, and that the latter had been violated by a public sale of the furniture after that period;—that, on the production of the lease, the defendant became aware of those breaches of the covenants therein, and required a waiver to be obtained from the landlord before he consented to take the house, but which had never been obtained;—also, that the defendant had frequently

pressed Messrs. Whitmore & Co. for a communication or reply on the subject of his letter of the 26th of December, 1845, but received no answer from them until the 1st of January, 1846, when a message was left at the defendant's chambers, to the effect that Messrs. Whitmore & Co. understood that defendant had made an arrangement for William Michael Tollner to be made a party to the assignment, in order to obviate the difficulty as to the breaches of the covenants of E. B. Clive in the lease; and that, in reply to such message, the defendant, on the same day, wrote to Messrs. Whitmore & Co. as follows:—

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“In reply to the message left here to-day, I beg to inform you that I have not made any arrangement with Mr. Tollner for making him a party to the assignment; if you have, there is no objection on my part to his being so.”

That, subsequently to the date of the last-mentioned letter, the defendant called several times on Messrs. Whitmore & Co., urging them to return the draft assignment, that the same might be engrossed and executed; but that Messrs. Whitmore & Co., in answer to such applications, stated that they were unable to get Mr. Tollner to come to any arrangement as to the breaches of covenant. That, about the middle of January, 1846, Messrs. Whitmore & Co. produced to the defendant a list of dilapidations, which they stated they had received from Mr. Tollner, but that Messrs. Whitmore & Co. did not then allege or insinuate that the defendant had undertaken to do such repairs. That afterwards, in the latter part of January, 1846, the defendant saw Mr. Whitmore, who then, for the first time, alleged that the defendant had undertaken to do the repairs; whereupon the defendant immediately denied that he had ever undertaken to do the repairs, but said, that if a copy of the

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notice were furnished to him, he would consider what part of the repairs he should be willing to take off the plaintiff's hands; whereupon Mr. Whitmore promised to furnish him with a copy of such notice of dilapidations. That, on the 30th of January, 1846, Messrs. Whitmore & Co. wrote and sent to the defendant the following letter:—

“ Clive to yourself.

“ Dear Sir,—Messrs. Snell state that they are prepared to give you positive evidence that it was fully and distinctly stated to you, after your offer for the house in Grafton-street was first made, but before you confirmed it, in the presence of Mr. Jay and one of the Messrs. Snell, that Mr. Clive would not pay for any repairs to the house. Under these circumstances, we can only say that we cannot, on the part of Mr. Clive, consent to your having the house on any other terms.

“ We are, dear Sir, yours obediently,

“ WHITMORE & Co.”

Whereunto the defendant wrote and sent, on the same 30th of January, 1846, the following answer, dated the 30th of January, 1846:—

“ Clive and self.

“ Dear Sirs,—Messrs. Snell's statement is very extraordinary. I have already fully explained the matter to you. I will not enter into any further discussion now. I should be glad to know whether you would undertake to appear for Mr. Clive to the proceedings I shall immediately institute for enforcing the contract between us.

“ HENRY BEAUMONT.”

Mr. *Walpole* and Mr. *Rasch* supported the bill.

Mr. *Wigram* and Mr. *Piggott*, for the defendant.—There

is no conclusive agreement. The defendant offered, it is true, to take the house; but the plaintiff's agents, in their answer to this offer, said, they hoped to give possession at half-quarter day. They thus introduced into the negotiation a new term, to which the defendant has never acceded. Their acceptance having been only conditional, and the condition having never been accepted, there is no complete contract.

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Mr. *Walpole*, in reply, was stopped by the Court.

The VICE-CHANCELLOR:—

The letter of the 30th of October is thus—"We are instructed by our principal, the Rev. Archer Clive, to accept the terms proposed by you, in your letter of the 27th ultimo," (which, it seems agreed on all hands, must mean the 27th instant), "for his house, No. 8, Grafton-street." Now, if the letter had ended here, there certainly would have been a complete agreement, at least in my opinion; because, as I conceive, the terms mentioned in the letter referred to were terms sufficient to constitute an agreement. Then comes this expression—"We hope to give you possession by the half-quarter day." I am of opinion that these words were not intended to operate, and did not operate, as a qualification of the contract or a qualification of the acceptance; but that if they had operated as a qualification of the contract or a qualification of the acceptance, the circumstances which afterwards occurred were more than sufficient to do away with any possible effect that could be supposed to arise from it. Let there be a decree for a specific performance.

Mr. *Wigram*.—In the usual terms?

The VICE-CHANCELLOR.—Yes. It will not be neces-

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sary or right now to make any inquiry as to the furniture or fixtures.

The decree declared that the agreement ought to be specifically performed, if a good title could be made, and directed a reference to the Master to inquire and state to the Court whether a good title could be made; and if the Master should be of opinion that a good title could be made, it was ordered that he should inquire and state to the Court when it was first shewn that such good title could be made.

The reference directed by the decree was prosecuted before the Master, when the defendant carried in his objections to the title, one of which was, that the plaintiff had not shewn any title previous to the 13th of November, 1830, the date of the lease. The Master allowed this objection, and reported that he was of opinion, that the plaintiff could not make a good title.

The plaintiff then presented a petition for a rehearing, on the ground that the decree was erroneous, inasmuch as it directed a general reference to the Master, to inquire whether a good title could be made; whereas the petitioner was advised, that the decree ought either to have directed the agreement to be forthwith specifically performed, or that the reference as to the title to the premises ought to have been so restricted or limited as to exclude any inquiry before the Master into the title to the messuage or tenement and premises prior to the indenture of lease of the 13th day of November, 1830.

The cause came on, on this day, to be reheard.

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Mr. *Walpole* and Mr. *Rasch*.—The defendant, by the course which the negotiations took, must be held to have waived the production of the lessor's title. After the lease was forwarded to him, he made various objections, but never once required the lessor's title to be shewn, or alluded to it in any way. On the contrary, the defendant himself forwarded a draft assignment, and negotiated respecting the terms of it, and even threatened proceedings on his part to enforce the agreement, without raising any objection as to the prior title, and he pressed upon the plaintiff the propriety of having the draft engrossed. It is clear, that, under such circumstances, the objection must be considered as having been abandoned: *Burroughes v. Oakley* (a), *Fordyce v. Ford* (b), *Warren v. Richardson* (c). [Mr. *Wigram*.—But the question of waiver is not raised by the pleadings, and is entirely an afterthought.] The waiver appears from the facts stated by the bill and admitted by the answer; and there is a charge in the bill, that the defendant considered himself bound, under the agreement, to take an assignment of the premises as from Christmas, 1845. [The *Vice-Chancellor*.—Does it appear whether, in *Warren v. Richardson*, the waiver was averred in the bill?] The report is only of the argument on further directions. [The *Vice-Chancellor*.—In *Fordyce v. Ford*, the question was rather of unfair representation than of title. The purchaser was there held to have gone on with a knowledge of the incorrectness of the representation.] And he was on that ground held to have acquiesced. There are upon the pleadings sufficient facts to raise the inference which we seek to draw, and we submit that it is not necessary to plead an inference of law. It is for the Court to draw

(a) 3 Swanst. 168, 171.

(b) 4 Bro. C. C. 494.

(c) *Younge*, 1.

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the inference from the facts pleaded. [The *Vice-Chancellor*.—It seems a question of pleading; for, subject, of course, to hearing the other side, the facts seem to me to shew, that the right to see the landlord's title had been waived.] In all the cases where the question has been raised on the bill, it has been in consequence of some statement in the answer. Now, in this case, there is not a single suggestion in the answer, that the defendant ever required the production of the landlord's title. If that question had been raised by the answer, the bill would have been amended. [The *Vice-Chancellor* referred to *Ogilvie v. Foljambe*(a).] They also cited *Hayden v. Bell*(b), *Fleetwood v. Green* (c), *Margravine of Anspach v. Noel* (d), Daniell's Chancery Practice, 2nd ed., vol. 1, p. 499.

THE VICE-CHANCELLOR:—

I will give the plaintiff an opportunity, if he please, of looking into the records of the cases cited; for, without disputing the truth in a certain sense, and for certain purposes of the proposition, that to state inferences or results of law is not the office of pleading, I confess myself not prepared to extend that proposition to the length to which the argument for the plaintiff is carried in this case.

I take it that, by law, the right of the purchaser here, from the moment that the contract was made, was a right given him by law, as a necessary result of the contract, to have the landlord's title shewn to him as a condition of having specific performance enforced against him. It is not alleged that he ever waived that right which the law gave him; but certain facts and circumstances are stated, which, by possibility, may lead to that inference or produce that result. My opinion at present is, that he is entitled to have his attention called to this—that the plaintiff

(a) 3 Mer. 53.

(b) 1 Beav. 337.

(c) 15 Ves. 594.

(d) 1 Madd. 310.

means so to use, and to ascribe such a character to, that combination of circumstances,—in order that he, the defendant, may disprove that, if he can, and may shew that other circumstances exist, or that a colour and character ought to be given to those alleged, which ought to lead to a different result: my impression is, that if a vendor means to insist that a right, which, independently of waiver, would belong to the purchaser, to have a title, has been taken from him by conduct, the waiver ought to be alleged, in order to draw his attention to it. But if there are authorities, the examination of which may shew, that, without any such notice given by the bill, the Court ought to attend, at the hearing of the cause, to such a state of circumstances, for the purpose of departing from the ordinary decree, I will most willingly give the plaintiff an opportunity to examine those authorities; for I repeat, that, subject to such a change in my opinion, as hearing Mr. *Wigram* and Mr. *Piggott* may very possibly effect, I think, upon the merits of the case, that the right to see the landlord's title had departed.

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Mr. *Walpole*.—I am nearly sure that there is no case in which this point of pleading has been discussed.

The VICE-CHANCELLOR.—Is it not alluded to in some of the cases given in Sir *Edward Sugden's* book?

Mr. *Walpole*.—I have gone through them all, with a view to see if that question was ever discussed, and I cannot find that it ever was. There are incidental allusions to the point; but, if your Honor will give me leave, I will take the opportunity of referring to the pleadings in some of these cases, and see if I can find whether the point was ever raised.

The cause accordingly stood over.

The *Vice-Chancellor*, in the course of the argument, asked to see the decree; and on finding in it the declaration

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that the agreement in the pleadings mentioned ought to be specifically performed and carried into execution, "in case a good title could be made to the premises comprised therein," said, that this contingent declaration was, as he thought, what Lord *Eldon* had said ought not to be in such decrees. In this case, his Honor said it was not of much consequence; but, he believed, Lord *Eldon* had said, that, in decrees for specific performance, the declaration ought not to be in that form.

Aug. 1st.

Mr. *Walpole*.—We have made the search, and we do not find distinctly, certainly, that there is any case in which it has been held by the Court that objections to title have been waived when it is neither charged nor prayed by the bill; but we have found one case in which it was only charged, and not prayed; and in *Ogilvie v. Foljambe* (a), it was not charged in the bill that the objections to title were waived, but a declaration was prayed that all objections to title were waived. The question is, whether, since the defendant is distinctly asked whether the agreement could not be specifically performed, and if not, why not, and the only reason he states in his answer is, that there is no binding agreement on the defendant—whether, in such a case as that, where the inference from the facts might fairly lead both parties to the conclusion, that objections to title were not intended to be taken, the Court might not be asked to declare, that all objections to title anterior to the period of the lease, which the plaintiff is willing to assign, should be considered as waived.

Mr. *Rasch*, on the same side.—The question is, whether the point has been sufficiently raised by the bill. I have searched the records of the cases referred to, and I find, that, in *Ogilvie v. Foljambe*, all the circumstances on which the plaintiff relied, as constituting a case of waiver, were

(a) 3 Mer. 53.

stated in the bill; but there was no distinct charge of the inference or of the conclusion to be drawn from these facts; the bill, however, prayed it might be declared, that the defendant was not entitled to the production of the lessor's title. That was the form of the record in *Ogilvie v. Foljambe*. In *Hayden v. Bell*, there was a distinct charge that the defendant had waived his right to call for the lessor's title; but the prayer of the bill in that case was in the usual form; and in *Hayden v. Bell*, a declaration was made, that the defendant was not entitled to call for the lessor's title. I should submit, that if we were here on the hearing of the cause, we might, under the prayer for general relief, have that qualified reference which we seek; for, under the prayer for general relief, any relief may be granted that is not inconsistent with the facts of the case. There is a case, *Jerard v. Saunders* (a), which contains some observations of Lord *Rosslyn* applicable to this question. The bill sought a discovery of deeds relating to the plaintiff's title, and an injunction to restrain proceedings in ejectment. It charged constructive notice of a settlement under which the plaintiff claimed, from a transaction in which certain deeds, the discovery of which was sought, were delivered. The defendant pleaded purchase for valuable consideration, without notice. The *Lord Chancellor* said:—"He must set forth the facts charged in the bill, from which the Court will construe notice, particularly, whether the title-deeds were delivered. He assumes to himself the proposition. He judges what is constructive notice, and then denies that, to his knowledge and belief, he had constructive notice. The bill does not impute direct notice to him. It is consistent with everything he says, in answer, that the very settlement itself might have been delivered. He must let the Court judge of that." Now, the inference I draw from that case is, that it is the

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v.
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(a) 2 Ves. jun. 187; 4 Bro. C. C. 322.

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province of the Court, not the office of the pleader, to draw the conclusion from the facts stated.

The VICE-CHANCELLOR.—I am sorry, on account of the nature of the case, to say, that my opinion is against the plaintiff on this point.

A decree was then taken, by consent, dismissing the bill, each party paying his own costs up to the decree, inclusive; and the plaintiff paying the defendant's costs, in the Master's office, and of the rehearing, the last not to exceed the deposit.

1847.
 May 25th &
 June 3rd.

A reference as to which of two suits is most for the benefit of infant plaintiffs, does not of itself stay the proceedings in the suits.

WESTBY v. WESTBY.

IN this case, two suits had been instituted, in the names of the same infant plaintiffs, by different next friends.

By an order made on April 17th, 1847, in both suits, it was referred to the Master to appoint a receiver, and to inquire which of the suits it was most proper and advantageous for the infant plaintiffs should be prosecuted, and whether such one of the suits, as he should think ought to be prosecuted, should be prosecuted by the then present next friend in the said suit, or by any and what other person.

May 25th.

A motion was, this day, made, that the inquiries directed by the above order might be made to the Master in rotation, and not to the Master to whom certain other suits were referred; and also, that the plaintiffs in one of the two first-mentioned suits might be at liberty to proceed in the cause notwithstanding the order of April 17th.

Mr. Russell, Mr. Cooper, Mr. Lee, Mr. Haldane, Mr. Torriano, and Mr. Schomberg, appeared for the different parties.

The *Vice-Chancellor* directed inquiry to be made at the Registrar's office as to the practice.

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The Registrars agreed that the reference as to which of two suits was most for the benefit of infants did not necessarily stay proceedings; and that though it generally had in practice that effect, it was competent to the Court to entertain any application pending the reference.

Mr. *Colville*, jun., the Registrar, who communicated to the Court the result of the inquiry, referred to *Sullivan v. Sullivan (a)*, and stated, that the order in that case did not contain any direction to stay proceedings, nor did the common form; but that the practice was, after report made, to apply for an order to stay proceedings in the defeated suit.

No order was made.

(a) 2 Mer. 40.

BISHOP v. CAPPEL.

June 29th.

WILLIAM BISHOP, by a codicil to his will, and indorsed thereon, dated October 27th, 1822, bequeathed as follows:—"It is my will and desire that the moiety or half part of the rest and residue of my personal estate, left as within to my brother George Bishop, one of my executors, shall not be left to him and his heirs for ever, but for the term of his natural life; and, after his decease, to go to Mrs. Sarah Bishop, his wife; and, at her decease, to go to such of my relations as shall survive them, share and share alike."

The testator died on the 28th of April, 1830, leaving three brothers and two sisters him surviving, of whom the

Residuary bequest to a brother of the testator for life, and after his death to his wife, and at her death to go to such of the testator's relations as survived them:—*Held*, to give the whole to the only one of the brothers of the testator who survived the tenants for life, to the exclusion of the children and representatives of brothers of the testator who survived him, but died in the lifetime of the second tenant for life.

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plaintiff, Vezey Bishop, alone survived Sarah Bishop, who survived her husband, and died on the 14th of November, 1843. The question was, whether the whole moiety belonged to the plaintiff, or whether the children of the deceased brothers and sister should participate.

Mr. *Russell* and Mr. *John Baily*, for the plaintiff.—The meaning of the expression “relations” is now settled to be the persons who, at the death of the testator, would be entitled to his personal estate under the Statute of Distributions; and the bequest is to such of this class as should survive the tenants for life; hence the plaintiff, being then the only survivor of the class, is entitled to the whole. This is, in fact, the decision in *Spink v. Lewis (a)*, where the testator directed the proceeds of real estate to be laid out at interest for ten years, and, at the end of that time, directed five-sixths thereof to be divided among such of his next of kin and legal representatives as should be then living under the usual and due course of representation. The only distinction between that case and the present was, that the period of postponement was ten years, whereas here it was for the continuance of two lives, and that here the description is, “my relations,” instead of “next of kin;” but neither of these circumstances alters the case, the word “relations” having been held to mean a definite class; and it seems as likely that the expression “such of my relations as shall survive” is intended to denote a selection from a class as to denote the entire class. There is another case, of *Green v. Howard (b)*, in the same reports, where the bequest was to the widow for life, with remainder to the testator’s own relations who should be then alive. [The *Vice-Chancellor*.—If one of the testator’s brothers had died, leaving children, between the date of the codicil and the testator’s death, would the children have partici-

(a) 3 Bro. C. C. 355.

(b) 1 Bro. C. C. 31.

pated?] It is not necessary for us to deny that they would. There is no distinction between a gift to relations and a gift to next of kin as to the period of the ascertainment of the individuals comprising the class; nor is the decision in *Spink v. Lewis* founded on anything peculiar to the class defined by the term "next of kin." The ground of the decision was, that the testator must have meant some class of persons of whom it was not certain that all would be alive when the gift was to take effect. Here, also, the testator intended a class, of whom it was doubtful whether all would survive the tenants for life. [The *Vice-Chancellor*.—Then, if the plaintiff had died before the surviving tenant for life, would there have been an intestacy?] That is the result of the words, and the same observation applies equally to *Spink v. Lewis* (a), but the Court did not then, on that account, depart from the most obvious import of the words of the bequest. They also referred to *Rayner v. Mowbray* (b) and *Doe v. Owen* (c).

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Mr. *Swanston* and Mr. *Hubback*, for children of a deceased brother.—According to the plaintiff's construction, there would be an intestacy. The words employed by the testator, in *Spink v. Lewis*, were technical expressions, having a definite meaning. But there are many cases in which the Court has come to the conclusion that the testator did not mean his next of kin at the time of his death, although that was *primâ facie* the natural import of the words: *Jones v. Colbeck* (d), *Clapton v. Bulmer* (e), *Butler v. Bushnell* (f), *Briden v. Hewlett* (g), *Minter v. Wraith* (h).

Sir *F. Simpkinson* and Mr. *Chichester*, for other parties,

(a) 3 Bro. C. C. 355.

(b) Ibid. 235.

(c) 1 Taunt. 263.

(d) 8 Ves. 38.

(e) 10 Sim. 426; 5 My. & Cr. 108.

(f) 3 My. & K. 232.

(g) 2 My. & K. 90.

(h) 13 Sim. 52.

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cited *Marsh v. Marsh* (a), *Miller v. Eaton* (b), and *Booth v. Vicars* (c).

Mr. *Bacon* and Mr. *Bates* appeared for other parties beneficially interested; and

Mr. *Anderdon* and Mr. *R. Moore*, for the trustees.

The VICE-CHANCELLOR:—

I think it very doubtful which of three constructions of which the codicil is susceptible is the correct one. The case of *Spink v. Lewis*, however, is so nearly in point, that it will be safer and better to decide in favour of the interpretation which will give the whole to Vezey Bishop. Lord *Thurlow* is, in that case, reported to have said:—"It was plain the testator meant, by next of kin, some class of persons of whom it was doubtful whether they would live ten years, and it was meant that they should pass through that chance. The question was, whether he was at liberty to take notice that, at that time, he had but one brother. If he had had several brothers, and nephews, sons of brothers, there would not have been a doubt that the division must have been among such of them as survived at the end of the ten years." What I have stated, therefore, must be considered to be my final opinion, unless I mention the case again before Tuesday next.

His Honor did not mention the case again.

(a) 1 Bro. C. C. 294.

(b) Coop. 272.

(c) 1 Coll. 6.

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ALEXANDER v. CANA.

June 29th.

THIS case came on upon an objection taken by the answer, for want of parties. The bill was filed by the trustees of a composition-deed, dated the 17th March, 1845, and made between the defendant, Robert Cana, of the first part, the plaintiffs of the second part, and the several other persons whose names were thereunto subscribed and seals affixed, of the third part. By this deed, for a nominal consideration, the defendant assigned unto the plaintiffs, their executors, administrators, and assigns, the several particulars therein mentioned of his estate, and all securities for money, and all other property whatsoever, of a personal nature, of him the said Robert Cana, save and except one share, No. 24, in the Universal Tontine at Ipswich, (which was to remain the property of the defendant), upon trust to sell, dispose of, and convert the same into money, and by, with, and out of the said trust-monies, or any part thereof, to carry on the farming business of the defendant, and pay all the costs, charges, or expenses to be incurred, or become payable, in or about the execution of the trusts, and to pay or divide the clear residue of the said trust-monies unto and among all and singular the creditors of the defendant who should sign the deed on or before the 1st day of July, 1845, in rateable proportions, according to the amount of the several and respective debts, subject, nevertheless, to the covenants and provisions thereafter contained; and each of them the plaintiffs and the several creditors, parties to the indenture of the third part, in consideration of the assignment thereinbefore made by the defendant, and of the trusts thereby created, thereby accepted the assignment thereby made of the stock, effects, debts, monies, and premises thereby assigned, in full payment, satisfaction, and discharge of all debts due and owing to

In a suit by the trustees of a composition-deed to compel the assignor to perfect the transfer of a portion of the trust property, the *cestuis que trustent* are not necessary parties; but a purchaser, to whom the trustees had contracted to sell the property in question, is a necessary party.

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them respectively by the defendant, and released the defendant, his executors, and administrators.

The bill, after stating the above-mentioned indenture, stated that it was duly executed by the defendant shortly after the date thereof, and that he afterwards applied to the plaintiffs and his other creditors to execute it, and to accept the composition thereby made, in discharge of their debts; that the plaintiffs and the said other creditors refused to comply with such request, unless the defendant would assign and transfer, upon the same trusts, the above-mentioned share in the Universal Tontine at Ipswich, and which share the defendant had, without the consent of the plaintiffs and the other creditors, excepted out of the indenture. That the defendant thereupon agreed with the plaintiffs, and such of his other creditors as afterwards executed the indenture, that if they would execute the indenture, and accept the composition thereby made in discharge of their debts, the defendant would assign and transfer the said share, No. 24, upon the same or the like trusts as were by such indenture declared, for the benefit of the plaintiffs and the other creditors of the defendant who should execute such indenture. That, accordingly, by a certain other indenture, dated 25th March, 1845, and made between the defendant of the one part, and the plaintiffs of the other part, and duly executed by the defendant, after reciting that, since the execution of the former indenture, the defendant had agreed to assign the Tontine share upon the trusts in that indenture expressed and declared, it was witnessed, that, for a nominal consideration, the defendant thereby assigned unto the plaintiffs, their executors, administrators, and assigns, all that share, No. 24, in the Universal Tontine at Ipswich aforesaid, and all dividends to become due for or in respect of the same share, from the day of the date of the said indenture, and all other shares of him the said defendant of the said Tontine, with power to give receipts, exonerating the persons to whom they were given from all liability for

the subsequent application of the said share, estate, or interest of the defendant of and in the said Tontine and premises aforesaid, or any part thereof, and from being answerable for the non-application thereof, and also to dispose of the share and premises thereby assigned, either by valuation, public sale, or private contract. And it was thereby declared and agreed, that the plaintiffs, their executors, administrators, and assigns, should stand possessed of the money which should come to their hands or which should arise from the said share in the Tontine and premises, upon trust to pay the costs of preparing and procuring the execution of that indenture, and all other costs of the plaintiffs in the execution of the trusts thereby reposed in them, and to pay and apply the remainder of such trust-money to the same purposes and in the same manner as were expressed and declared by the indenture of the 17th March, 1845, of and concerning the money to arise or come to the hands of the plaintiffs under that indenture.

That immediately after the execution of the indenture of 23rd March, 1845, by the defendant, and before 4th July, 1845, and on the faith of having the benefit of the same, and in pursuance and performance on their part of the aforesaid agreement, the plaintiffs, and divers other creditors, amounting altogether to twenty-seven in number, and whose debts, with the debts due to the plaintiffs, amounted in the whole to more than three-fourths of the sums in which the defendant was indebted, so far as the same had come to the knowledge of the plaintiffs, executed the indenture of the 17th March, 1845.

That the plaintiffs had in part executed the trusts of the indenture of the 17th of March, 1845, and had sold and converted into money all the property assigned by such indenture, and applied the money upon the trusts therein declared, but had been prevented by the defendant, in manner thereafter appearing, from selling and converting into money the Tontine share.

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That the Ipswich Universal Tontine was established by an indenture, dated 25th January, 1790, which contained a provision in these words, for the transfer of shares in the Tontine:—"And in order to regulate the transfer of shares in the said Tontine, and to ascertain the real proprietors thereof with such precision as in concerns of this nature is advisable and essentially necessary, it is hereby agreed and declared, that all and every proprietor and proprietors of any part or share, or parts or shares, of the said Tontine, shall and may, during the continuance of the life or lives for and upon which he, or she, or they hath or holdeth, or have or hold, any part or share of the said Tontine, by indorsement on the voucher, to be delivered to each such proprietor for his or her subscription to the said Tontine, direct and authorise a transfer to be made of his or her right and interest in the said Tontine, to or in favour of any other person, on the same life or lives for which his or her subscription or subscriptions was or were made. But in every such case of transfer or succession, or in case of any right becoming acquired by marriage, or otherwise accruing, the existing subscription voucher shall be brought in and rendered up to be cancelled and exchanged for a new one, to issue in lieu thereof, adapted to the occasion, so that the actual proprietor for the time being, whether covert or sole, and the life subscribed on, may in every case be always manifest, without which no claim by any such directed transfer, or by succession, marriage, or other accruer whatever, shall be of any avail within the intent of this Tontine."

That the transfer of shares in the Tontine was still regulated and governed by the terms and provisions of such last-mentioned indenture; and that the committee of directors and managers, and their actuary or secretary, refused to recognise any other mode of passing any interest in such shares. That, subject to the equitable assignment thereof to the plaintiffs, made by the indenture of the

25th March, 1845, the defendant was the legal proprietor of the said share, No. 24, in the said Ipswich Universal Tontine, and appeared and was upon and in the books of the Tontine such legal proprietor; and that, although the indenture of the 25th March, 1845, was a good assignment in equity of such share, yet that until the said share should have been transferred to the plaintiffs, by the indorsement and delivery to them by the defendant of his voucher for the share, the defendant would continue the proprietor of such share.

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That, in part performance of the trusts of the indentures of the 17th March and the 25th March, 1845, the plaintiffs lately sold by public auction the said share, and had applied to the defendant to indorse and to deliver up to the plaintiffs his voucher for the same, so that the share might be transferred to the purchaser thereof; but that he refused to comply with such application, and that in consequence thereof plaintiffs had been unable to complete such sale.

The prayer was, that the defendant might be decreed and compelled to indorse on his voucher for his said share, No. 24, in the Ipswich Universal Tontine, a direction and authority for a transfer to be made of his right and interest in the said Tontine, to the plaintiffs, according to the provisions of the indenture of the 25th January, 1790; and that the said defendant might be decreed to deliver to the plaintiffs his said voucher, and to do all other acts necessary on his part to be done, in order that the plaintiffs might be admitted and entered the proprietors of the share.

The defendant, by his answer, objected that the *cestuis que trustent* under the deeds and the alleged purchaser were not parties.

Mr. John Bailly, for the defendant, in support of the objection.—As the plaintiffs do not sue on behalf of themselves and all other creditors, but in their character of

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trustees, the *cestuis que trustent* are necessary parties: *Kirk v. Clarke* (a). The only exception to this rule is, where a trustee seeks to recover from his co-trustee part of the trust-property; for which the plaintiff would be liable in respect of a breach of trust committed by the other trustee. Nor can it be said that the creditors are too numerous, for it has been recently held, that twenty persons were not a sufficient number to induce the Court to relax the ordinary rules of pleading. At all events, it is clear that the purchaser must be made a party: *Maule v. Duke of Beaufort* (b).

Mr. *Chandless* appeared for the plaintiffs.

The *Vice-Chancellor*:—Confine yourself to the objection as to the purchaser.

Mr. *Chandless*.—The only relief which the plaintiffs could seek against the purchaser would be a specific performance; and the present defendant might demur, if he were made party to such a bill: *Tasker v. Small* (c). The defendant disputes the right of the plaintiffs; how then can he allege a claim in a party claiming under them?

Mr. *John Baily*, in reply.

The VICE-CHANCELLOR held that the creditors were not necessary parties, and that the purchaser was a necessary party.

(a) Prec. in Ch. 276. (b) 1 Russ. 349. (c) 3 My. & Cr. 63

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GILLAN v. MORRISON.

June 22nd.

THIS was a suit instituted by a trustee of a company to enforce contribution from the subscribers, under the following circumstances:—

In January, 1841, a meeting was held, with a view to the formation of a settlement in Central America, in a district called Blue Fields, or Segovia, within the dominions of the King of the Mosquito nation, from whom one of the projectors, Mr. Bell, produced to the meeting a grant, dated the 31st of May, 1821, of all the lands, erections, and mines within the following limits, viz. all the sea-coast from the southern part of Blue Fields Lagoon to the southern entrance of the Pearl Key Lagoon, and making the Spanish territory the western boundary.

This grant was made to one Peter le Lacheur, who had conveyed one moiety of the lands comprised in the grant to Mr. Bell, and agreed to convey the other moiety to his co-adventurers.

Certain resolutions were passed at the meeting, and were signed by the chairman. Appended to them were two memoranda of agreement, one signed by Mr. Bell, whereby he declared that he would, when called upon by the trustees of the British Segovia Company, named in the tenth resolution, execute articles in conformity with the second resolution; the other signed by the plaintiff and the defendants, who thereby agreed to become provisional proprietors in the joint-stock of the company, according to the number of shares affixed to their respective names.

By the second resolution, the company agreed to purchase conditionally 500,000 acres of land, comprised in the above-mentioned grant, and to pay to Mr. Bell, by way of deposit, £6000, within four months after the return to England of an expedition to be dispatched for the purpose of exploring the country.

By the terms of the resolutions on the formation of a company, the object of which was to purchase land and found a colony, certain trustees had the control of an expedition to explore the district, and it was resolved that the expense of the expedition should not exceed a certain sum, and that the subscribers were not to be liable beyond a fixed amount. On the arrival in the country of the persons proceeding on the expedition, they were seized and thrown into prison, and owing to this the project failed, and the loss greatly exceeded the limit fixed by the resolutions:—*Held*, that the trustees could not call on the subscribers for contribution beyond the fixed amount.

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The third resolution provided that articles founded on the terms of the second resolution should be prepared and signed on behalf of the trustees on behalf of the company, and by Mr. Bell.

Then followed these resolutions:—

Fourthly. That in order to raise a sufficient sum of money to defray the expense of an expedition to Blue Fields, or Segovia, to explore the territory, its rivers and lagoons, and to obtain ample and accurate reports upon the climate, soil, productions, and other characteristics of the territory, so as to enable a judgment to be formed of its eligibility for a settlement, there be allotted 240 shares, of £25 each, in the capital stock of the company; upon which shares two calls of 2*l.* 10*s.* each per share to be paid thereon; the first instalment to be paid immediately upon the shareholder subscribing these resolutions or signifying his written assent thereto, and the second instalment to be paid within four months thereafter.

Fifthly. That the expense of the expedition shall not exceed the sum of £1200 (unless under the circumstances mentioned in the next succeeding article); and that no person subscribing these resolutions shall be liable for any sum of money beyond the instalments paid upon his shares.

Sixthly. That if it should be found by the trustees that the sum of £1200 is not sufficient to defray the costs of the proposed expedition, they are hereby empowered to allot sixty additional shares; upon which the two calls of 2*l.* 10*s.* per share are to be paid in the manner above provided; and that such additional shares are to be subject in all respects to the same conditions as the other shares.

Seventhly. That within one month after the arrival of the expedition in England, or after receipt of reports from the parties engaged therein, which may be considered satisfactory by the trustees, a meeting of the shareholders shall be held in London, at which the reports shall be submitted; and if a resolution be adopted by two-thirds in number of

the shareholders then present, approving the provisional agreement entered into between the trustees of the company and George Bell, and assenting to the constitution of the company founded thereupon, each shareholder shall be entitled to demand a certificate or acknowledgment for twenty shares in the capital stock of the company, and the sum of £50 already paid by him shall go in part of the instalments or calls payable upon such shares.

Eighthly. That each shareholder subscribing these resolutions, or assenting thereto, shall also be entitled to a free grant of 2000 acres of land in the territory of Blue Fields, or Segovia, out of the 100,000 acres of land specifically reserved to Mr. Bell in the agreement, to be held under such conditions as the meeting, provided for by the previous resolution, shall determine.

Ninthly. That any shareholder who does not pay the second instalment of 2*l.* 10*s.* per share at the period fixed by the preceding resolution, shall forfeit the first instalment already paid by him, together with all claim or title to the free grant of land.

Tenthly. That the following persons be, and they are hereby appointed, trustees of the company, viz.

[Here followed their names and descriptions]:

Who are hereby authorised to direct the fitting out of the expedition, and to nominate the parties who are to conduct the same, and to have the control and management of the fund raised by the calls or instalments upon the shares.

In pursuance of these resolutions, the trustees, for the purpose of the expedition, chartered a ship, which left London in March, 1841, and touched at Cape Gracios a Dios, where Mr. Bell, who was one of those who sailed on the expedition, obtained from the King of the Mosquito nation a confirmation of the grant made to Le Lacheur.

On arriving at the intended settlement, the members of the expedition were seized and thrown into prison at Aco-

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yapa, by the government of New Grenada, and Mr. Bell died in prison there.

The expedition having failed, and the outlay of the trustees having, owing to the unforeseen events attending the expedition, greatly exceeded the proposed limit, the plaintiff, by his bill, sought contribution from the subscribers.

Of the plaintiff's co-trustees, one had become bankrupt, another was out of the jurisdiction, and the remaining one had never had acted.

✱ Mr. *Russell*, Mr. *Wigram*, and Mr. *Faber*, for the plaintiff, contended that the expenses contemplated by the parties, on signing the resolutions, were such as then might probably be expected to be incurred; but that the loss which the trustees had sustained, owing to the unlawful and violent procedure of the government of New Grenada, was never intended to be comprehended within the limit prescribed by the resolutions. This loss was left, therefore, untouched by stipulation, and must, like any other unprovided for by express contract, fall rateably on those who engaged in the adventure, and who would have shared the profits, if the result had been different.

Mr. *Bacon* and Mr. *Lloyd*, who appeared for a shareholder; and

Mr. *Lovat* and Mr. *Cairns*, for other shareholders, were not called upon.

Mr. *Blunt* appeared for the assignees of the bankrupt trustee..

The VICE-CHANCELLOR:—

In this case it is impossible, with propriety, to forget that the sole plaintiff is one of the acting trustees; and I collect

that, according to the contract between the persons engaged in the undertaking, the trustees, or such of them as might act, were to have the entire conduct of the undertaking, and had it, in fact, without any interference on the part of the other shareholders. The persons from whom contribution is sought are shareholders, and not trustees. I am of opinion that, according to the true construction of the contract, the trustees, choosing to undertake the expedition, and to have the conduct of it, undertook, as between themselves and the shareholders, the whole risk of the expedition, exceeding £1500, the amount fixed by the resolutions. They may not have thought of the risk, or may have been willing to incur it. I do not know how that may be, but it is the intention to be collected from the document signed by the parties, and I have nothing else to proceed upon. [His Honor read the fourth, fifth, and sixth resolutions, and said]—My construction of these clauses, in connexion with the rest, is what I have said.

It is, however, argued, that the loss was occasioned by misfortune, and does not, therefore, necessarily come within the meaning of the term “expenses.” I am sorry to be unable to accede to that argument. It appears to me that the trustees must be considered to have undertaken, as between themselves and the shareholders, that all expenses beyond those limited by the resolutions should be borne by them. I do not think, therefore, that this suit can succeed to any extent beyond that limit. If, however, the whole of the prescribed sum has not been raised, my present impression is, that to that extent the contribution may be claimed.

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June 25th.*

In the Matter of PAUL FRANCIS JOSEPH PONGERARD, an Infant, and in the Matter of 11 GEO. 4 & 1 WILL. 4, c. 65.

Seemle, that 1 Will. 4, c. 56, s. 32, empowering the Court, on the petition of the guardian of an infant, to direct payment of maintenance out of dividends of stock standing in infant's name, does not authorise the appointment of a guardian, and a direction for payment of dividends upon the same petition, although the guardian appointed is one of the petitioners, but that two petitions are proper.

CHARLOTTE PONGERARD, by her will, bequeathed the residue of her personal estate to trustees, upon trust to convert the same into money, and pay the same to two persons, one of whom was the above-named infant.

The surviving trustee, after paying one moiety to the other legatee, transferred the remaining moiety, consisting of 800*l.* 1*s.* 4*d.* £3 per Cent. Bank Annuities, into the joint names of himself and of the above-named infant; and afterwards, out of further trust-monies forming part of the infant's moiety, purchased a further sum of 34*l.* 4*s.* 2*d.* £3 per Cent. Bank Annuities to the same account.

The trustee having died on the 27th of February, 1847, one Mr. John Vallance and the infant (who would not attain the age of twenty-one till the 18th of March, 1850) presented a petition, under the 1 Will. 4, c. 65, s. 32, which provides that it shall be lawful for the Court of Chancery, on the petition of the guardian of any infant in whose name any stock shall be standing, and who shall be beneficially entitled thereto, (or, if there shall be no guardian, by an order to be made in any cause depending in the said court), to direct all or any part of the dividends due or to become due in respect of such stocks, to be paid to any guardian of such infant, or to any other person, according to the discretion of the said Court, for the maintenance and education or otherwise for the benefit of such infant.

The prayer of the petition was, that Mr. John Vallance might be appointed as the guardian of the infant, and might be at liberty to receive the dividends already due and to accrue due on the sum of 834*l.* 5*s.* 6*d.* £3 per Cent. Bank

Annuities, for the purpose of, and to be applied for, the maintenance or otherwise for the benefit of the infant.

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On this petition two orders were made—one on April 10th, appointing Mr. Vallance guardian, and directing the rest of the petition to stand over till April 21st; and the other, on April 21st, directing the dividends already due and to accrue due on the two several sums of 800*l.* 1*s.* 4*d.* and 34*l.* 4*s.* 2*d.* stock to be paid to Mr. Vallance, to be applied for the maintenance or otherwise for the benefit of the infant petitioner.

The Bank was advised that it was doubtful whether the latter order was within the act, inasmuch as Mr. Vallance was not the guardian of the infant when he joined him in presenting the petition.

The present petition was then presented by Mr. Vallance alone, stating his appointment as guardian, by the order of April 10th, and praying the payment of the dividends to him, for the maintenance or otherwise for the benefit of the infant, until March 18th, 1850, (when he would attain twenty-one), or until the further order of the Court; and that the Governor and Company of the Bank might be ordered and directed to pay such dividends accordingly.

Mr. *Daniel* supported the petition.

The VICE-CHANCELLOR made the order.

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Where proof is given of the loss of a written instrument by a document which itself shews that such instrument was originally insufficiently stamped, the Court will not presume that the instrument was ever properly stamped, nor admit ordinary secondary evidence of its contents. But the Court received as secondary evidence a draft of such written instrument produced at the hearing, with such a stamp as the instrument itself required, although the instrument appeared to have been only lost by the party sought to be charged, and was not proved to have been fraudulently destroyed by him.

The proper form of a bill by an equitable

mortgagee, being also a specialty creditor, who seeks to charge the real assets of a testator generally, as well as to enforce his security, is on behalf of the plaintiff and all other the creditors of the testator, and the Court permitted a plaintiff at the hearing to amend his bill accordingly; and, with reference to the Statute of Limitations:—*Held*, that such bill must date from the day of the filing of the original bill, and not from the day of the amendment.

A plaintiff was required to account for the delay of nineteen years in filing his bill, where the circumstances of the parties had changed by deaths; and the foundation of the suit being a legal demand, the Court, after such delay, declined to act, unless the demand was established in an action.

THE bill was filed by the personal representative of Joseph Buckley against the personal representatives of Thomas Wood, in respect of a claim arising out of transactions which commenced in 1812. According to the plaintiff's case, the following were the material facts:—

Prior to the year 1812, Joseph Buckley, who had formerly been a porter in London, became possessed of 877*l.* 4*s.* 1*d.* Five Pounds per Cent. Navy Annuities; and, having left London, he went to reside with Thomas Wood, then a farmer at Charlton, in Berkshire, and resided with him up to the time of his death, at a distance from his family connexions.

It appeared that Buckley and Wood had been fellow-workmen in London. Buckley was ignorant, and dull of intellect; Wood, on the contrary, was a shrewd person.

In October and December, 1812, Buckley went to London, sold his stock, which realised 792*l.* 4*s.* 2*d.*, and advanced it to Thomas Wood. The plaintiff alleged that this was a loan by Buckley to Wood, the repayment of which was secured by the bond of Thomas Wood, dated the 5th of December, 1812; and that the condition of the bond was, that Wood should replace the 877*l.* 4*s.* 1*d.* Navy Five per Cents. on the 5th of June then next, with a sum equal to the dividends which the stock would have produced, if not sold. The plaintiff also alleged that the money was further secured by the deposit, with Buckley, of the title-deeds of

a freehold estate at Charlton and Grove, the property of Wood, and by a memorandum of deposit, also dated the 5th of December, 1812. It was further alleged by the plaintiff that Buckley kept the deeds in a box, in his own possession, in the house of Wood, with whom he resided, and that Wood could get possession of them when he pleased. It appeared that, from the date of the loan, there was no account kept between Wood and Buckley, Wood paying no interest, but providing Buckley with his board and lodging and necessities, and such sums of pocket-money as he wanted.

Buckley died in 1824, at the house of Wood. Thomas Buckley Bridgen, of Derby, upholsterer, was his heir-at-law and sole next of kin.

Wood informed Bridgen of the death of Buckley, by a letter, in which he stated that Buckley had lived to spend all the property he was possessed of, and that there was nothing for Bridgen.

Bridgen went to Charlton, on the receipt of this letter, and called on Wood to give up to him his uncle's deeds and securities, which Buckley, in his lifetime, had told him he had. Wood said Buckley had nothing left but two crown pieces and his clothes. Bridgen returned to Derby without obtaining any further information as to his uncle's property.

Bridgen lived until 1839, having occasionally made endeavours to discover what had become of his uncle Buckley's property, but without any result.

By his will, dated the 18th of October, 1826, Bridgen appointed the plaintiff, James Blair, and two other persons, his executors, of whom one died in the testator's lifetime, but the other survived his testator, and died without proving the will.

The plaintiff, Blair, proved Bridgen's will in 1840, in the court of the Bishop of Lichfield. The plaintiff was not then aware of the claim in respect of Buckley against Wood;

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but, having obtained some information on the subject, he proved Bridgen's will, in the Prerogative Court of Canterbury, in 1844; and, shortly before the commencement of the suit, he also obtained letters of administration, out of the same court, to the effects of Buckley.

Wood made his will on the 18th of July, 1842, and thereby devised all his freehold, leasehold, and copyhold hereditaments and premises to Mr. W. Ormond and the Rev. W. Hayward, in trust for sale, with powers to give effectual receipts to purchasers; and in the testator's will was contained a trust for payment of the testator's debts out of the proceeds of the sale of his real estates; and the testator appointed Messrs. Ormond and Hayward executors of his will.

Shortly after Wood's death, which occurred in March, 1843, Messrs. Ormond and Hayward proved his will.

Messrs. Ormond and Hayward entered into contracts for sale of their testator's estates, including the hereditaments of which Wood was alleged to have deposited the title-deeds with Buckley.

The bill was filed by Blair, as the representative of Buckley, against Messrs. Ormond and Hayward and the parties who had contracted to purchase the hereditaments, the title-deeds of which the plaintiff alleged had been pledged with Buckley, stating the transactions fully, with various circumstances in confirmation, putting the case as one of actual fraud against Wood, and praying for an account of what might be due and owing to the estate of Buckley, for principal and interest on the said securities, and for payment to the plaintiff, as representative of Buckley and Bridgen, of the sum of 877*l.* 4*s.* 1*d.* Navy Five per Cents., or an equivalent amount of the stock into which the same had been converted, with a sum equivalent to the dividends in the meantime; and that, on default of satisfaction, the proceeds of the sale of the hereditaments at Charlton and Grove might be paid to plaintiff; and if that should be in-

sufficient, then for relief against the real and personal estate of the testator Wood for the deficiency.

Messrs. Ormond and Hayward, the principal defendants, by their answer, stated, that Buckley lived with Wood, in London, from 1796 until 1812, they being both porters, the former paying 12s. per week for his board; that Wood having gone to reside at Charlton, Buckley followed him. Their case was, that, whatever money Buckley handed over to Wood, it was intended as a free gift to Wood, in consideration of Buckley's maintenance and support for the remainder of his life, and of the friendship that subsisted between them; and that, if the advance were originally intended as a loan, the debt was afterwards forgiven by Buckley.

Evidence of a conflicting character was gone into, The substantial parts of it will be found in his Honor's judgment.

Mr. *Swanston* and Mr. *Wright* appeared for the plaintiff; and Mr. *Russell* and Mr. *Heathfield*, for the principal defendants, Messrs. Ormond and Hayward.

It was part of the plaintiff's case that the bond from Wood to Buckley, to secure the transfer of the stock to the latter, and for the payment of the dividends in the meantime, and an agreement accompanying the bond, constituting the equitable mortgage of the hereditaments in question, had been fraudulently obtained and destroyed, or put away by Wood in the lifetime of Buckley.

It appeared, from the answer of Messrs. Ormond and Hayward, that these documents were not in their possession.

The plaintiff, at the hearing, as the foundation of his case, proved that these documents existed at one time, that search had been made without finding them, and that notice had been given to the defendants to produce them; and he

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proceeded to give secondary evidence of their contents, proving the existence of the bond in the following way:—

Of Messrs. G. & C. Baster, the solicitors who were concerned in the transaction, in 1812, between Buckley and Wood, Mr. G. Baster, the partner who alone attended to it, was proved to be in a state rendering him incapable of giving evidence. Mr. C. Baster, the other partner, knew nothing of the transaction; he, however, produced the bill of costs charged to Wood for business done for him, and a memorandum, in the hand-writing of Mr. G. Baster, as follows:—"Settled, G. B.;" which he deposed to be the mode in which Mr. G. Baster used to mark that the accounts of clients were paid. The bill of costs, at the foot of which was such memorandum, contained the following items:—

	£	s.	d.
As to the advance of 877 <i>l.</i> 4 <i>s.</i> 1 <i>d.</i> stock on your own security, to enable you to make the following arrangement:—			
Attendance on you and Mr. Buckley, making annuities of stock, and taking instructions for bond for replacing same, and agreement to execute mortgage of your property in Charlton and Grove, when called on.	0	6	8
Drawing special bond for the purchase and transfer of the stock to Mr. Buckley, and payment of dividends in the meantime, fols. twelve	0	12	0
Engrossing same	0	8	0
Paid for stamp and paper	3	0	6
Drawing agreement to execute mortgage on depositing title-deeds, fols. twelve	0	12	0
Engrossing same	0	8	0
Paid for stamp and paper	0	16	3
Attendance on you and Mr. Buckley, reading over and explaining bond, and agreement when you signed same, and settling the business between you	0	6	8

The draft of the bond so proved to have been engrossed on paper, having a stamp of £3 affixed, was then produced from Mr. Baster's possession, and tendered to be read in evidence.

Mr. *Russell* and Mr. *Heathfield* objected, that the draft could not be read, since the document which was alleged to prove that the bond had existed, itself shewed that it bore an insufficient stamp, under the Stamp Act then in force.

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Mr. *Swanston* and Mr. *Wright*, for the plaintiff.—The original being lost, it is to be presumed that it was, at some time, properly stamped, although it might have been insufficiently stamped at the time of its execution. This presumption is sufficient, though rebutted by negative evidence. Thus, in *Rex v. Long Buckley* (a), an indenture of apprenticeship, proved to have been lost, was, after thirty years, presumed to have been duly stamped; and although the proper officer proved that it did not appear that any such indenture had been so stamped or inrolled during the whole thirty years, yet the Court would not allow this negative evidence to rebut the presumption, and secondary evidence was admitted.

[They also cited *Crisp v. Anderson* (b), and *Travis v. Collins* (c).]

But, even if the Court should assume that the original was insufficiently stamped, it will be competent for the Court to admit this draft as a copy, if the Stamp-office will now stamp it, and it be produced properly stamped. This has been done at law; and this Court will at least as readily permit a merely formal objection to be got rid of. In *Bousfield v. Godefroy* (d), the defendant had improperly obtained possession of an original agreement between himself and the plaintiff, and alleged that he had lost it. An order was made, that the defendant should hand over a copy of a copy admitted to be in his possession; and that if the plaintiff on the trial produced the same duly stamped, the defendant should not be permitted to produce the original.

(a) 7 East, 45.

Tyr. 726.

(b) 1 Starkie, 35.

(d) 5 Bing. 418.

(c) 2 C. & J. 625; S. C., 2

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In *Smith v. Henley* (a), Lord *Lyndhurst*, although he decided that in that case parol evidence could not be admitted of an unstamped written agreement, which was not produced, recognised the principle on which *Bousfield v. Godefroy* proceeded, and said (b), he should be very glad to act upon the authority of that case.

Besides, the present is a case made against a spoliation and destruction of a document, and *omnia præsumuntur contra spoliatores*: *Amory v. De la Marie* (c), and *Mortimer v. Cradock* (d). A similar doctrine was held by Lord Chief Justice *Holt* (e).

They also cited *Huddleston v. Briscoe* (f), *Wheeldon v. Matthews* (g), *Haigh v. Brooks* (h), and *Smart v. Nokes* (i).

Mr. *Russell*, in reply.—This draft bond is not admissible, whether stamped or unstamped. The general principle is, that you cannot give secondary evidence of a document which could not itself be put in evidence if it were produced for that purpose. What the Lord Chancellor said, in *Smith v. Henley*, in reference to *Bousfield v. Godefroy*, was altogether extra-judicial; and his Lordship's decision proceeded on other principles and other authorities.

The VICE-CHANCELLOR said, that, but for the decision in *Bousfield v. Godefroy*, he might have had some hesitation in admitting the evidence. The defendant's contention, however, would lead to this result—that where an agreement, either not stamped or insufficiently stamped, has been destroyed, the person who has destroyed it may have the full benefit of his own wrong; a consequence that might well weigh with the Court in deciding a doubtful question.

(a) 1 Phill. 391.

(b) 1 Phill. 395.

(c) 1 Str. 505.

(d) 12 L. J., N. S., C. P., 166.

(e) 1 Lord Raym. 731.

(f) 11 Ves. 583.

(g) 2 Chit. 399.

(h) 10 Ad. & E. 309.

(i) 6 M. & G. 911.

It might be said, that *Bousfield v. Godefroy* was assumed to be a case of fraud; and that *Smith v. Henley* was a case of fraud; and that, though the present was alleged by the plaintiff to be a case of fraud, it was not shewn to be so, the defendant's case not having been heard; but if it would be right to admit a copy in case of fraud, the principle would seem to extend to admitting a copy of an instrument lost by the party sought to be charged.

The principle of *Bousfield v. Godefroy* was recognised in *Smith v. Henley*, though perhaps extra-judicially. And on the authority of the former, with the sanction of Lord *Lyndhurst's* recognition, and not upon his own opinion, his Honor said, that, in favour of abstract reason, good sense, and substantial justice, he most willingly decided to receive the draft, if properly stamped.

The cause proceeded, but before its termination the draft of the bond had been taken to the Stamp-office, the penalty paid, and the stamp affixed. It was tendered and received in evidence in the cause.

The draft of the agreement of deposit, charged for in the above bill of costs was also tendered in evidence, and its production was also objected to, on the ground that it did not appear that the original had been stamped, and on the negative inference, that, no stamp having been charged for in the bill, the original agreement was not stamped. But it became unnecessary to decide this point, because the plaintiff, with the permission of the Court, converted his bill into a creditor's bill on behalf of himself and all other the creditors of the defendant's testator, Wood.

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It appeared, that, from the death of Buckley up to the filing of the present bill, a period of 19 years and 358 days had elapsed.

His Honor said, the plaintiff ought to account for this delay, not by way of meeting any question upon the Statute of Limitations, but as a matter of fact that required explanation.

Mr. *Swanston* and Mr. *Wright*, for the plaintiff.—Mr. Bridgen's residence at Derby being some distance from Charlton, and his having been unable to obtain any sufficient assistance or exact information, sufficiently accounts for nothing having been done until after his death in October, 1839. Mr. Blair's ignorance of the facts sufficiently accounts for his delay till he filed the bill in 1844.

In point of fact, this suit is within the Statute of Limitations; but that statute does not affect a fraud, upon which the plaintiff puts this case. Lord *Erskine* has said, "No length of time can prevent the unkenneled a fraud." And all the cases have gone upon this principle.

[They cited *Trevellyan v. Charters* (a), *Watson v. Toone* (b), *South-Sea Company v. Wymondsell* (c), *Alden v. Gregory* (d), and *Morse v. Royal* (e).]

Mr. *Kenyon Parker* and Mr. *Haynes* appeared for several purchasers, defendants.

Mr. *Piggott* appeared for other purchasers.

The VICE-CHANCELLOR dismissed these defendants, and thought that the bill should be amended. His Honor

(a) 11 Cl. & Fin. 714.

(b) 6 Mad. 153.

(c) 3 P. Wms. 144.

(d) 2 Eden, 280.

(e) 12 Ves. 355.

said, that where there were real assets, and the plaintiff sought to charge them generally, as a creditor, he must sue on behalf of himself and all the other creditors. His Honor referred to *Trotter v. Trotter* (a).

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The plaintiff's counsel then asked leave to amend the bill, by converting it into a bill on behalf of the plaintiff and all other creditors of the testator.

Mr. *Russell* and Mr. *Heathfield*, for the defendants Ormond and Hayward, submitted that the bill ought to be dismissed at once; or that, at all events, the plaintiff should be put to establish his claim in an action, before the Court would interfere.

They submitted, that the case and evidence at the bar differed from the case made by the bill, and that the Court should not even grant an issue (b).

If the bill were to be amended, the defendants submitted, that the date of the amendments must be taken to be the date of the bill. They further urged, that the Court would consider the effect of long acquiescence, with knowledge. Wood died in 1843. There was no fact now before the Court that was not then known.

Mr. *Swanston*, in reply, referred to *Hooper v. Stephens* (c).

The VICE-CHANCELLOR:—

Mr. Blair, the plaintiff in this case, sues as the administrator of a person called Buckley. Buckley died, and, it must be taken for the purposes of this case, intestate, in the month of September, 1824. No representative of him existed, until the letters of administration which the plain-

(a) 5 Sim. 383; Jac. 533.

Exch. 467.

(b) *Cooper v. Byrom*, 3 Y. & C.

(c) 4 Ad. & E. 71.

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tiff took out in the year 1844, in which year the bill was filed; the object of the bill being to establish that Buckley was a creditor by bond and equitable mortgage on the estate of Thomas Wood, who died in the year 1843.

It appears that Buckley died at a distance from his relatives, in the house of Wood, and that the sole next of kin of Buckley, at his death, was a person called Bridgen, who was, I think, a tradesman at Derby, Buckley having died in Berkshire. Of that Mr. Bridgen, who lived until the month of October, 1839, Mr. Blair was the surviving executor, and it was in the character of the surviving executor of Bridgen, the sole next of kin of the intestate, who had died, as I have said, in 1824, that the letters of administration were granted to the plaintiff.

Upon the question, whether the fact, asserted on one side and denied on the other, of debt, should be decided by this Court or left in the first place to an action, in the circumstances of this case, I am of opinion, that, without laying down any general rule, Mr. Blair and Mr. Bridgen ought to be considered, for every substantial purpose, as identical. Considering them, then, for every substantial purpose, as identical, ought or ought not this Court to act on the notion of debt, without an action at law?

Now the circumstances are certainly of a peculiar nature. Buckley was a person in humble life, as was Wood; they appear to have been fellow-workmen and intimate friends; Buckley appears to have been a bachelor, Wood was a married man. Buckley took up his residence in the house of Wood; he passed a great portion of his life with him, was domesticated with him, lodging and boarding with him, and appears to have lent that which was substantially all his property, being a sum little short, I think, of £900, in the Navy Five per Cents. of that day, to Wood, taking a bond for it, and an equitable mortgage. This occurred in the year 1812, some twelve years before the death of Buckley, during all which period Buckley continued to live,

as I have said, in Mr. Wood's house. I have not heard the defendant's case; but, as far as the plaintiff's case is concerned, Buckley appears not to have been a very strong-minded man; certainly was not, as I gather, a person of much education; he hardly could have been, from his station in life; and Wood seems to have had considerable influence over him—I do not say improper influence, or influence improperly exercised: upon that I give no opinion. The arrangement between them seems to me to have been, in general, that Buckley was to pay a certain weekly sum to Wood for his board, which Wood was to pay to himself, or to receive from Buckley, out of the dividends from the stock which Wood had taken by way of loan from Buckley, and upon which he was to pay stock interest, as it is called, settling the balance between them, as it might happen.

Buckley died, and it is alleged that the bond, and the deeds which are said to have been deposited by way of equitable mortgage, on the occasion of the transaction of 1812, were, at his decease, not forthcoming—at least, the deeds not as in Buckley's possession, and the bond not at all; and it is alleged on the part of the plaintiff, that Wood, being master of the house in which Buckley died, fraudulently possessed himself of the bond and deeds, kept them to himself, and either destroyed or effectually suppressed the bond.

That is the plaintiff's case, which may or may not be true; and, if such a case had been promptly brought forward, there might have been ground on which a Court of equity would have been disposed to interfere, in the first instance, on this question of debt. Now, the death of Buckley took place, as I said, in the year 1824. Afterwards, in that same year, Mr. Bridgen goes from Derbyshire to Berkshire, and enters upon an investigation. He sees Wood, talks with him, inquires into the facts, and sees also a gentleman of the name of Ormond, who appears

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then, whether Mr. Bridgen knew it or not, to have been, in fact, Mr. Wood's solicitor, but who it was supposed would also consent to be employed, or did consent to be employed, for Mr. Bridgen. It is to be collected, that, on the visit of Bridgen, he learnt that there had been a bond, that there had been an equitable mortgage, but that the debt was denied, and he learnt circumstances calculated to excite, and which did excite, suspicion. After making the inquiries, he returned to Derby; and after his return, I think on the 24th September, 1824, this letter is written by Mr. Simpson, the solicitor of Bridgen, to Mr. Ormond, the professional gentleman of Berkshire whom I have mentioned:—

“ Sir,—On the return of my client, Mr. Bridgen, he communicated to me the result of his inquiries after the property of his deceased uncle, and the very active handsome assistance you had afforded him in this most mysterious transaction, the whole of which is so pregnant with suspicion, that, however discouraging the present prospect of establishing a case against Mr. Wood may be, Mr. Bridgen considers it more important to bring any fraud to conviction than even obtaining the money; and, with both objects in view, will not feel satisfied in relaxing his present inquiries. I therefore unite with him in requesting your professional assistance in pursuing the inquiry, and that, in case proceedings should be deemed advisable, you will consent to join me in the conduct of them. As in these cases so much depends upon taking information at the first moment, before prudence suggests silence, I think it would be material were you and Mr. Barnett to see Wood again, and make a minute of what passes, particularly his admission that a bond was once in existence for the debt, and that he has it not now to produce; and if you could see the deeds which were deposited as a security, and obtain his admission that they had been so deposited, the next step would be to secure

secondary evidence of the bond and the loan; and your early attention after Mr. Baster," (which obviously means the Mr. Baster who had prepared the bond and agreement), "who prepared it, would be desirable. I understand the nephew was privy to the loan, and is not upon very friendly terms with his uncle; he might now be induced to say something more, and he promised to supply us with the numbers of the notes which were paid to the deceased, and afterwards lent to Wood. It has occurred to me, that it would be as well to state, that any person giving information should be handsomely rewarded, to the extent of its importance, on the recovery of the money; it might induce some of the servants to communicate anything they know, particularly any observation of the deceased as to his property, and having at the time of his death the possession of the bag of writings." (That bag is, I suppose, what one of the witnesses calls a pillow-case, and one a bolster-case). "My idea is, that, when it is known that you are acting as the solicitor of Mr. Bridgen, you will have facts detailed that otherwise would be lost for want of a knowledge where to communicate. It would be idle to discuss any course of legal proceedings, but my present intention is, to lay the case, after we have obtained all probable evidence, before counsel, and, if they think there are grounds, to pursue Mr. Wood, either criminally, for having stolen the security, or by proceedings to recover its value; I am persuaded Mr. Bridgen will risk the expense of their adoption. I shall feel obliged at any time by hearing from you, and feel well assured, that, in a course of inquiry, which requires considerable promptness and delicacy, Mr. Bridgen may rest satisfied that all will be done by you which can be done.

"I remain, Sir,

"Your most obedient humble servant,

"J. B. SIMPSON.

"William Ormond, Esq., Wantage, Berkshire.

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"P. S.—Mr. Bridgen also wishes you will see Mr. Shaw. The vicar, on his return, also he thinks might know something of the affairs of the deceased."

Now it may well be, and I am disposed to assume, that Mr. Simpson wrote this letter not knowing that Mr. Ormond was the attorney of Mr. Wood. It is thus answered by Mr. Ormond on the 5th of October, being some ten or eleven days after its date.

"Sir,—I beg to acknowledge the receipt of your letter relative to the late Mr. Buckley, and, in answer thereto, beg to decline any further interview with Wood. Being, as Mr. Bridgen has been informed, the attorney for Wood, I do not think I could conscientiously act in the way you have pointed out." Now, let me pause here to observe, that the remark is obvious—so obvious, indeed, as to be next to superfluous—that Mr. Simpson, having his client close at hand, had the power of asking his client, if Mr. Simpson did not know it, "Is this true, that Mr. Ormond stated to you, or that you, Mr. Bridgen, knew that Mr. Ormond was Wood's attorney?" If Bridgen's answer had been, "No: he never said so; the statement is false or mistaken;" that would have added to the grounds of suspicion. But, on the other hand, if the allegation contained in this letter of Mr. Ormond, that Mr. Bridgen was informed of it, was true, the remark has a different bearing on the subject. Mr. Ormond's letter proceeds:—"When Mr. Bridgen was here, I stated to him, that, if I could be of any service to him then in obtaining from Wood the exact circumstances of the case, I would do so; but, as I acted professionally for Wood, I must request that some other person should be present at our interview; in consequence of which, I saw Wood in the presence of Mr. Barnett, but was unable to work any good with him. The result of our meeting, Mr. Bridgen

was made acquainted with by me and Mr. Barnett. I, therefore, situated as I am, cannot further interfere in the business."

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Whether there was mistake, or misapprehension, or concealment, or an absence of mistake, misapprehension, and concealment, with regard to any professional connection between Wood and Ormond, that was effectually terminated by this letter of the 5th of October, 1824, which letter leaves Mr. Bridgen in the position of a man knowing the outline, at least, of the facts, knowing that there were grounds of suspicion, and suspecting, indeed aware, that Mr. Ormond would not act professionally for Mr. Bridgen in the matter. Bridgen lives until the year 1839,—fifteen years after this inquiry—and takes no steps. Mr. Blair becomes his executor. Wood lives more than three years after Bridgen's death, nor is any step taken in Wood's lifetime. After the death of these two persons, in both, or one at least, of whom there existed so much likelihood of ability to give useful information, and not until then, is the present suit instituted in the year 1844.

On these special grounds, and because, for the present purpose, I am of opinion, that Mr. Blair and Mr. Bridgen are to be considered as one, I think that the Court ought not to act unless the debt shall be established at law. Therefore, let an action upon the bond be brought, and let the action be admitted to have been commenced on the day of filing the bill. It should also be admitted that the bond is not in the possession or power of the plaintiff.

Upon notice by the plaintiff, a fortnight before the trial, that he wishes Ormond to be examined for the defence, let him be examined accordingly, without prejudice to any question as to Ormond's credit.

The defendants are to admit assets; execution is not to issue without leave of the Court.

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The usual directions as to witnesses on the trial of an issue.

The trial to be at Gloucester.

No objection is to be taken to the plaintiff's letters of administration to Buckley.



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NOKES v. LORD KILMOREY.

In a suit by a vendor for specific performance against a purchaser, if the contract stipulated that the possession should be given at a specified day, it is competent for the purchaser to insist that both time and a vacant possession are of the essence of his contract; and the Court will receive, as evidence that such was the purchaser's object, statements made by the agent of the purchaser at the time of signing the contract.

THIS was a suit to enforce specific performance of a contract by the defendant for the purchase of lands at Twickenham, part of Pope's Villa estate.

The contract for purchase was as follows:—

“ Articles of agreement made and entered into this 23rd day of December, 1844, between James Wright Nokes, of Park Place, Knightsbridge, in the county of Middlesex, Esquire, of the one part, and Charles Appleyard, of Lincoln's Inn, in the county of Middlesex, gentleman, agent for the Right Honourable Francis Jack Needham, Earl of Kilmorey, of Shavington, in the county of Salop, of the other part: Witnesseth, that the said James Wright Nokes hath contracted and agreed to sell to the said Francis Jack Needham, Earl of Kilmorey, and the said Francis Jack Needham, Earl of Kilmorey, hath contracted to purchase

Where a purchaser has consented to enlarge the time for completion, and where a vacant possession was of the essence of the contract, it is competent for him to object to complete at the expiration of such enlarged time if the possession is not then vacant, and if he has done no act towards completion of the contract after he had notice that vacant possession could not be given at the day.

But where a purchaser had by his acts waived the time of completion in the first instance, and had gone on for some time inducing the vendor to incur expenses to perfect his title, and suddenly, upon the discovery that vacant possession could not be given according to stipulation, declined to complete, the Court, although it dismissed a bill filed against such a purchaser for a specific performance, dismissed it without costs.

from the said James Wright Nokes the fee simple and inheritance of and in the freehold, and in the copyhold hereditaments holden of the manor of Isleworth Lyon, hereinafter mentioned, and respectively situate at or near Twickenham, in the county of Middlesex; that is to say, the two messuages and dwelling-houses in the possession of Thomas Washington and David Crole, as tenants to the said James Wright Nokes, with all the ground in front of and belonging to the said two messuages or dwelling-houses respectively; and all that field in the possession of the said Thomas Washington, as tenant to the said James Wright Nokes, situate and lying behind the said two messuages and dwelling-houses above mentioned, and bounded on each side thereof by land the property of Earl Waldegrave, and containing six acres, or thereabouts; and also all that field called the Upper South Field, in the possession of Benjamin Castledine, as tenant to the said James Wright Nokes, adjoining to land the property of the said Earl Waldegrave, and fronting to the higher road from Twickenham to Hampton Court, and containing about seventeen acres; and all that field called the Lower South Field, in the possession of the said Benjamin Castledine, as tenant to the said James Wright Nokes, adjoining to the said field called the Upper South Field, situate on the lower road from Twickenham to Teddington, and containing about five acres; and, also, all that field called Summit Meadow, in the possession of the said Benjamin Castledine, as tenant to the said James Wright Nokes, and situate between the river Thames and the said lower road from Twickenham to Teddington, and containing about eight acres, together with all the timber, and other trees, wood, and underwood standing and growing on all the said before-mentioned premises respectively, at or for the price or sum of £7000; and that the said James Wright Nokes shall and will, within the space of one month from the date hereof, at his own expense, cause and procure to be made and delivered to

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the said Francis Jack Needham, Earl of Kilmorey, his agent or attorney, a full, complete, and perfect abstract, in the usual manner, of the title of him, the said James Wright Nokes, thereto; and, also, that the said James Wright Nokes, or his heirs, and all other necessary parties, shall and will, on or before the 24th day of June next, execute a full and proper conveyance for conveying and assuring the fee-simple and inheritance of the hereditaments hereinbefore described or referred to, to be prepared in the usual and proper form, and tendered to them for that purpose, by the said Francis Jack Needham, Earl of Kilmorey; and, also, that he, the said James Wright Nokes, and all other persons having any estate therein, shall, at the next general court to be holden for the manor of Isleworth Lyon after the said Francis Jack Needham, Earl of Kilmorey, shall have accepted the title of the said James Wright Nokes to the inheritance in possession in fee-simple, according to the custom of the said manor, of the said copyhold premises, duly surrender the same, according to the custom of the said manor, to the use of the said Francis Jack Needham, Earl of Kilmorey, his heirs and assigns, or as he or they shall direct: And it is hereby agreed, that, on such surrender being made, and on such respective executions of such respective deeds as aforesaid, the said Francis Jack Needham, Earl of Kilmorey, shall pay to the said James Wright Nokes the said sum of £7000; and that the said James Wright Nokes shall deliver the possession of all the premises to the said Francis Jack Needham, Earl of Kilmorey, on or before the said 24th day of June next; and that the said James Wright Nokes shall not in the meantime cut down any trees, or commit any other waste upon the said premises, or grant any lease or leases thereof, without the privity and consent of the said Francis Jack Needham, Earl of Kilmorey."

The contract also contained various usual stipulations

as to evidence of title and identity of parcels, and a statement that the freehold and copyhold parts were then intermixed, and the precise boundaries of each could not be then ascertained.

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Mr. Nokes, who was the sole plaintiff, acted himself, without any solicitor on his behalf, in respect of the above contract; but his competency so to act was not questioned in the cause.

The solicitor and agent of Lord Kilmorey, who was the sole defendant, on entering into the contract, informed the plaintiff that the defendant was desirous of having the purchase completed as soon as possible; and that it was necessary, for the purposes of the defendant's purchase, that he should have the unoccupied possession of the premises given up to him on the completion of the purchase; to which the plaintiff replied, that there were three tenants under terms to the plaintiff to quit at the end of six months' notice, and that he could not complete the purchase and deliver the possession over until the 24th of June, 1845, and he would give all the tenants notice to quit on that day. It was not questioned that Lord Kilmorey's object in purchasing was to live on the land, and that the plaintiff was aware of that being his object.

The abstract of the title was not delivered to the defendant's solicitor until the 5th of April, 1845, and it then appeared that the premises were on mortgage to Mr. Hooke; and some of the title-deeds were produced for examination on the 21st of May, 1845, but others remained to be produced; and on the 18th of June, 1845, Mr. Hooke's solicitor wrote from Worcester to the defendant's solicitor in London, that the remaining deeds might be inspected at any time.

The 24th of June, 1845, having arrived, the defendant did not insist on completing on that day, or decline completion, in consequence of the title not having been then perfected.

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On the 4th of July, 1845, a clerk of the defendant's solicitor went to Worcester, and examined the remaining title-deeds.

The abstract of title was then, for the first time, laid before counsel for the defendant. Immediately afterwards, the abstracts of further deeds (being various incumbrances) were required, but were not delivered, until the 9th of October, 1845, by the mortgagee's solicitor to the solicitor for the defendant.

In August, 1845, the defendant's solicitor complained to the plaintiff that the defendant had been delayed in his building by the plaintiff's default, but intimated that the defendant would leave England for the winter, and would consent to wait for the completion of his purchase until his return to England in the spring of 1846, but not later.

In November, 1845, the plaintiff, for the first time, employed a solicitor on his behalf in the transaction.

In January, 1846, the defendant's solicitor was induced to and did prepare the draft of the conveyance, which was approved of by the plaintiff's solicitor on the 3rd of March, 1846, and, it having also been approved of by the mortgagee's solicitor, it was ingrossed and sent, on the 21st of March, to the plaintiff's solicitor but it was not forwarded to the mortgagee's solicitor until the 31st of March, 1846.

A draft surrender of such of the property purchased as was copyhold, having been prepared by the defendant's solicitor, was sent, on the 17th of March, to the plaintiff's solicitor; but nothing further was done as to this draft.

Early in March it had been agreed that the purchase should be completed on or about the 25th of March.

On the defendant's solicitor applying, on the 25th of March, for an appointment to complete the purchase, a new delay was suggested, as being necessary, in order that a purchase of other parts of the plaintiff's property might be completed at the same time.

On the 31st of March, the defendant's solicitor ascer-

tained that two of the tenants had not received effectual notices to quit, and that they would not quit.

In consequence of these circumstances, the defendant's solicitor, on the 1st of April, 1846, peremptorily declined to complete the contract.

The details of these transactions being fully entered into in his Honor's judgment, it is not necessary to state the circumstances more fully.

Mr. *Wigram* and Mr. *Parsons*, for the plaintiff, cited *Halsey v. Grant* (a).

Mr. *Russell* and Mr. *Calvert*, for the defendant.

Cur. adv. vult.

The VICE-CHANCELLOR:

July 17th.

This is a case, rendered by its particular circumstances one, as it appears to me, of difficulty; and I would have longer deferred my judgment, if I had not become convinced that I could not usefully, for either of the parties, give it more attention or consideration than I have done.

Whatever may be thought of the nature of the controversy on either side, it cannot, I think, be denied that the defendant's answer sufficiently apprised the plaintiff both of the grounds of the defence and of the evidence by which it might be expected to be supported; an observation, if ever immaterial, not so, I think, here.

The contract between the parties (dated the 23rd of December, 1844) contains a stipulation for delivery of "the possession" of the property in question to the purchaser on or before the 24th of June, 1845, when the purchase was to be completed; and I must, I conceive, consider as true the statement contained in the deposition of Mr. Apple-

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yard to the third interrogatory, in which that witness expresses himself thus:—"On the 23rd of December, 1844, I was solicitor or agent for the defendant, and I am such his solicitor at the present time. On the 23rd day of December, 1844, I entered into a contract with the plaintiff for the sale of certain premises at Twickenham, in the county of Middlesex, to the defendant, and I entered into such contract and signed as agent for and on behalf of the defendant. The plaintiff did not employ any solicitor, with reference to such contract, at the time of the making thereof; but he acted therein on his own behalf. On the occasion of my entering into the contract hereinbefore mentioned, I informed the plaintiff that defendant was desirous of having the purchase completed as soon as possible, and that it was necessary, for the purposes of the defendant's purchase, that he should have the unoccupied possession of the premises given up to him on the completion of the purchase of the same. The plaintiff then informed me that the then tenants of the said premises, of whom there were three, were under terms to him, the plaintiff, to quit at six months' notice, and he could not complete the said purchase and deliver the possession to the defendant before the 24th day of June then next; and that he would give all the tenants notice to quit on that day. In consequence of this communication, the date of the 24th of June, 1845, was accordingly inserted in the contract for sale. In my said communication with the said plaintiff, I informed him that the object of the defendant in purchasing the property was to build thereon."

At this time the property was, to the defendant's knowledge, occupied severally by three tenants, Mr. Ashe, Mr. Washington, and Mr. Castledine. The three, or at least the two former, (as to whose tenancies alone the difficulty between the parties has arisen), held (it must, I think, be considered) as tenants from year to year; but, in strictness, probably rather as tenants to Mr. Hooke, who appears to

have been in receipt of their rents as a mortgagee in possession, than to the plaintiff.

It does not, I think, appear that when the contract was made, either the defendant or Mr. Appleyard was aware of Mr. Hooke's position or title.

It is to be collected, that, on the 24th of December, 1844, the plaintiff served notices to quit on Mr. Ashe and Mr. Washington, which would, I suppose, have been sufficient if Mr. Hooke's title and position had not been such as they were; but which appear to have been, by Mr. Hooke and the plaintiff, after the year 1844, and by Mr. Ashe at least, if not by him and Mr. Washington, in or after that year, considered, and, according to my impression, correctly considered, as insufficient.

If, however, the notices were not insufficient, it is, I think, a just inference from the facts appearing that they were waived. It so happened that Mr. Ashe and Mr. Washington did remain occupying tenants up to the time when the suit was commenced, and afterwards. And it must, I conceive, upon the whole of the evidence, be taken, that, at the time of filing the bill, (which was on the 18th of April, 1846), they were occupying tenants from year to year; that neither of them was at that time under any notice, or at least under any valid or sufficient notice, to quit; and that there is no reason for believing that either of them quitted, or was willing or compellable to quit, until some time not earlier than December, 1846, certainly.

To return to the year 1845. When Midsummer arrived matters were not in a state rendering the completion of the purchase at that time possible. This was not attributable to the defendant; but he did not reject or claim to reject it on that ground. Some progress—if progress is a right word—was made towards completion, at least after the verbal communication of August, mentioned by Mr. Appleyard in his evidence, upon the fourth interrogatory, where he deposes thus:—"I did, in January, 1845, communicate to

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plaintiff with respect to his delivery to me of his abstract of title of premises in the pleadings in this cause mentioned, in which communication I informed the plaintiff that I believed the defendant was by former purchases already in possession of part of the title of the aforesaid premises, and that I should therefore only require the plaintiff to furnish so much of the title to the said premises as the defendant was not then already in possession of. I made this communication in order to save expense to the plaintiff. I had, previously to this communication, frequently applied to the plaintiff for his abstract of title to the said premises. On or about the 23rd of February, 1845, I did, at the request of the plaintiff, apply by letter to Mr. Laslett, of Worcester, the solicitor of Mr. Hooke, the mortgagee of the premises in question, for a list of the title-deeds in his (Mr. Laslett's) hands, that I might inform him of the particular deeds of which I should require him to give me an abstract on the plaintiff's account; and, on the 28th of February, 1845, Mr. Laslett sent me the list of deeds so required; and, upon my perusing the list, I found that the deeds therein set out (with the exception of one or two of them) were not in the abstract then already in the defendant's possession; and I therefore requested the plaintiff, by letter, to direct Mr. Laslett to send me the full abstract of title to the said premises; and, on the 26th of March, 1845, I received from Mr. Laslett an abstract of title to the premises, but which abstract was not in a complete state. Immediately, upon the receipt of such abstract of title, I perused the same, and, about the 5th of April, 1845, I applied, by letter, to Mr. Laslett to send up the title-deeds to his agent in London for my examination with the abstract. About the 28th of April, 1845, I received a letter from Mr. Laslett, informing me that he would arrange for the deeds to be in London the latter end of the then week, or the beginning of the week then next following. Mr. Laslett did not bring up or send the said

title-deeds to London until about the 21st of May, 1845; and, about the last-mentioned day, the examination of the title-deeds with the abstract of title was commenced, in the presence of William Laslett; and such examination was completed about the 24th of May, 1845. In the course of such examination it was discovered that Mr. Laslett had omitted to bring up some of the title-deeds, but which Mr. Laslett stated to be in the possession of the mortgagee, and for the production of which Mr. Laslett undertook to arrange on his return to Worcester. About the 18th of June, 1845, Mr. Laslett wrote and informed me that the remaining deeds might be inspected; and about the 4th of July, 1845, I sent one of my clerks to Worcester, who there examined the remainder of the deeds. The abstracts of title, which were long, and, in my opinion, difficult, were then directly laid before a conveyancer for his opinion, who proceeded to peruse such abstract, and about the 22nd of August, 1845, in consequence of an intimation from the said counsel, I wrote to the plaintiff, informing him that counsel desired to have abstracts of all the deeds, with reference to the incumbrances upon the premises, and desiring him to let me have the abstracts as soon as he could, because I was very anxious to get the purchase completed as soon as possible. Notwithstanding this letter, as also my repeatedly pressing the plaintiff for the abstracts, the abstracts of title were not delivered till about the 9th of October, 1845. Under these circumstances an arrangement, in the month of August, 1845, took place, with reference to the postponement of the completion of the contract, and in the same month I reminded the plaintiff that it had been impossible to complete the purchase within the time stipulated by the contract, in consequence of the delays in the delivery of the abstracts of title and the production of the title-deeds; and that the defendant had been thereby delayed in his intentions of building on the premises; and I informed the plaintiff he was going abroad

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for the winter, and would consent to wait for the completion of his purchase until his return to England in the spring of 1846, but not later. To this arrangement the plaintiff consented."

The plaintiff, at that time, had not a solicitor in the matter. Whatever may have been the case as to him, I may here say, that I do not see any ground for imputing delay or inactivity to the defendant or his solicitor at any stage of the business, either in or after the year 1845.

That year rolled on, and ended; another spring came, and still the purchase was, without any fault on the defendant's part, not completed, and still the contract was alive. Masters, however, had, by little and little, so far advanced in the course of the fourteen or fifteen months which had passed since 1844, that there were indications upon which the plaintiff, if he did not rely, might, perhaps, without much rashness, have almost relied as promising him peace and speedy payment: "*Nescius auræ fallacis.*" Towards the close of March, 1846, there arose a cloud out of Lincoln's-inn, like a man's hand. A letter, dated the 30th of that month, from the defendant's solicitor to the plaintiff's solicitor, was thus:—"I think that it would be better that you should at once demand possession of the premises from Messrs. Crole and Washington, and arrange a day this week with Mr. Laslett for the completion of the purchase."

And now it seems material to go back for a while to an earlier period of the month, and to read, from Mr. Appleyard's evidence upon the fifth and sixth interrogatories, what he there states to have taken place in March and April. He expresses himself to the following effect:—"A meeting took place about the 7th day of March, 1846, between myself and Mr. Dolman, the plaintiff's solicitor, on which occasion it was agreed that the purchase should be completed on or about the 25th of March, 1846. Several letters passed between myself and Mr. Dolman, with ref-

rence to the completion of the contract; among them was a letter from me, dated the 24th of March, 1846, to Mr. Dolman, in which it was stated that the unoccupied possession of the premises would be required. I wrote that letter, in consequence of my having heard from the defendant, who was then returned to England and residing at Twickenham, that there might be some difficulty with one of the tenants of the premises as to his giving up possession of the land, then in his occupation, at the time of completion of the purchase.

"I had a communication with the plaintiff's solicitor on the 25th day of March, 1846, and requested an appointment to be made for the completion of the purchase, when the plaintiff's solicitor informed me that he could not give me an appointment for that purpose, in consequence (as he stated) of some circumstances creating a delay with a purchaser of another part of the plaintiff's property, whose purchase it had been agreed should be completed at the same time as that of the defendant, in order that the entire mortgage-money of the said Mr. Hook might all be paid off at one time.

"On the 29th of March, 1846, I had a communication with the plaintiff's solicitor, and I then informed him that it was necessary to the defendant that the said purchase should be completed immediately.

"I wrote and sent a letter, dated the 1st of April, 1846, marked 2, in which the completion of the contract was absolutely abandoned, to Mr. Dolman. Under the circumstances following, on the 30th of March, 1846, I wrote to Mr. Laslett, stating that the defendant's purchase-money was ready, and that I should be glad of an appointment to complete, and requesting Mr. Laslett to get the possession of the premises for the defendant immediately. I then went down to Twickenham to see the defendant, who was impatient to complete the purchase, and stated to him the difficulty which I experienced in obtaining an appointment

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to complete the said purchase. I then ascertained that two of the tenants of the premises had not received due notice to quit, and would not go out, and that the purchase could not, therefore, be completed for some time to come; whereupon the defendant instructed me to write the letter of the 1st of April, 1846. A communication did take place between myself and the plaintiff and his solicitor on the 3rd of April, 1846; in consequence of my said letter of the 1st of April, 1846, the said plaintiff's said solicitor then requested me to write to the defendant to induce him to alter his determination of abandoning the contract for purchase. I then reminded the plaintiff's solicitor that the agreement between the plaintiff and defendant was, that the tenants of the premises should be got out, and that the defendant should have the entire possession upon the completion of the purchase. The plaintiff's solicitor admitted this, and then requested me to inform the defendant that the tenants could be got out directly if the defendant would withdraw the notice and complete the contract. A communication took place between myself and the plaintiff on the 6th of April, 1846, when the plaintiff called upon me, at my office, to inquire if there were any means of inducing the defendant to consent to complete his contract, when I reminded the plaintiff of his agreement with the defendant to give the defendant the unoccupied possession of the premises on the completion of the purchase, and that I had discovered that the plaintiff had not given due and proper notice to the tenants, two of whom would not give up possession of the premises. I then asked the plaintiff whether he could by any possibility get such tenants out. He stated that he could not: that he had been to them, and that they would not consent to go out; and that he could not therefore perform that part of his agreement with the defendant; and that the plaintiff could not tell within what time he could give possession to the defendant, because he did not know when the periods of tenancy commenced. At a subse-

quent part of this interview, the solicitor of the plaintiff came into the room, and I then informed him that the defendant was determined not to complete the contract, because the unoccupied possession of the premises could not be given to him. The plaintiff's solicitor then, to the best of my recollection, replied, that, although that might be the agreement, the words of the contract were not, in his opinion, sufficient to warrant that sort of possession being given; and that he should file a bill against the defendant to try the question. The plaintiff has not, as I believe, at any time since the month of December, 1844, had the power of completing the contract mentioned in the said pleadings, by reason of his not being able to give up the unoccupied possession of the premises to the defendant; whereas the defendant has, ever since the month of December, 1844, and up to the 1st of April, 1846, been willing and anxious to fulfil the contract; and, as I believe, to occupy the said premises and build a residence upon the same, or part thereof; and the defendant only declined to complete the contract for the above reasons."

On the 18th of April, as I have said, the bill was filed; and the question is, whether the defendant was, in the view of a court of equity, entitled to break off the matter, as he did, after all that had taken place.

Now, assuming the defendant to have wished to build, and that without delay, on some part of the property, the evidence has failed to satisfy me that he proposed or meant to do so on that smaller portion of it, (separated from the land in Castledine's occupation, and not abutting upon it, at least so I collected), which was held partly by Mr. Ashe, and as to the rest by Mr. Washington; and I am not persuaded that it was a matter of importance to the defendant that either Mr. Ashe or Mr. Washington should quit his holding in 1845 or 1846. Still it cannot, I think, be denied that the defendant had a right to stipulate, and to stipulate effectually, if expressly and distinctly, that, whether for a good

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or a weak reason, time and a vacant possession should be of the essence of the contract. And upon the pleadings and evidence, I conceive, that Lord Kilmorey, being here a defendant in a suit for specific performance, has relevantly alleged, and has sufficiently for the purposes of the cause proved, that in effect he did so stipulate—I do not say in the written contract; nor do I say how the case would have stood had Lord Kilmorey been a plaintiff instead of a defendant; Lord Kilmorey having, in 1845, consented to enlarge the time to the spring of 1846, it is very possible that the mere delay which took place as to the title and conveyance—the mere state in which the title and the progress towards the conveyance were—would not have justified or supported him in breaking off as he did. But it was found, that, as far as Mr. Ashe's tenancy and that of Mr. Washington were concerned, there could not be vacant possession before Christmas, 1846. I think that, taking this objection in time, he had a right to take it as a fatal objection to the completion of the purchase. Did he take it in time? My impression is that he did. He might, by himself or his solicitor, with actual or constructive notice (I mean, of course, notice as between the plaintiff and defendant, not notice merely as between the defendant and the tenants) of the true state of the circumstances in which the holding of Mr. Ashe and that of Mr. Washington stood, have so acted as to preclude himself, on the ground of waiver or otherwise, from the defence made in this suit. But, upon the whole of the evidence together, (and I have read every part of it), I do not find any sufficient reason for believing or supposing such a state of things. I think it not proved, and that there are not grounds for judicial inference, that actual or constructive notice (I mean, of course, as between the plaintiff and defendant) of the fact that Mr. Ashe and Mr. Washington were neither willing nor compellable to quit at or before Lady-day, 1846, reached the defendant or his solicitor at a time such as to render any of the acts of either of

them a waiver of the right, or inconsistent with a fair exercise of the right, to insist on the circumstances of the holding of either tenant as creating a bar to the performance of the contract; and my impression consequently is, that I ought not to give relief upon this bill in the particular circumstances of the case. But though I dismiss it, I do not do so very willingly; nor can I give the defendant the costs.

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THIS was a demurrer by some of the directors of a projected railway company, who were defendants to a bill filed by three co-plaintiffs, stating the following case:—

That, in the month of August, 1845, Mr. Francis Edward Henry Fowler, an engineer, and Mr. Vaughan Prance, a solicitor, acting in concert with the defendants thereafter named, formed a scheme for establishing a joint-stock company or co-partnership, for the purpose, as they alleged, of constructing a railway from Minehead to Bridgwater, both in the county of Somerset; and that, with such view, they made the necessary return of the several particulars required by the provisions of the 7 & 8 Vict. c. 110; and that, in September, 1845, the company was provisionally registered under the name of "The Bridgwater and Minehead Junction Railway Company." That an announcement of the proposed railway, and of the objects which it was intended to carry into effect, was advertised in the London and county newspapers by the defendants, or by their direction. That, towards the latter end of September, 1845, Francis Dayrell, Charles Bailey, William Frederick

Three several allottees of shares in an intended railway company filed a bill against the directors, alleging that the deposit on the shares allotted to them respectively had been wholly paid by one of them, and that they were jointly interested in them; and further alleging circumstances to shew that the prospectus, on the faith of which the deposit was paid, contained untrue and delusive statements, which had been put forth by the defendants without any inquiry into their truth, and that

the directors had kept back shares for the purpose of selling them at a premium. The bill charged that this was the purpose they had in view in carrying on the scheme, and not the benefit of the public; and prayed for a return of the deposit, with interest. A demurrer for misjoinder of plaintiffs and want of equity was overruled.

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Beadon, Frederick William Green, William Simpson Polter, Samuel Pocock, James Morrison, and William Revel Vigers, (the defendants thereafter named), caused a prospectus or circular to be printed and circulated, purporting to be a complete prospectus of the intended company, and of its objects, and to contain a correct statement of the names and addresses of the managing directors, and of the officers of the company. The bill set out the prospectus, which commenced as follows:—

“Bridgwater and Minehead Junction Railway Company, uniting the Bristol and English Channels, and forming a direct communication between the south of Ireland and Wales with Bristol and London, and also with the south-eastern and western coasts of England, Paris, and the Channel Islands. Provisionally registered.

“Capital, £500,000, in 25,000 shares of £20 each; deposit, £2. 2s. per share; liability expressly limited to the amount of subscription.”

The prospectus, after setting forth at great length the advantage of the scheme, stated as follows:—

“The landowners have been communicated with, and are most anxious for the successful carrying out of the objects of the company; nor is there any reason to expect that any Parliamentary opposition will be offered (a). The line will be twenty-five miles in length, and no engineering difficulties present themselves. Until an act of Parliament shall be obtained, the affairs of this company shall be under the control of the managing directors, to whom power is given to allot the shares, and to apply the funds of the company in payment of all the expenses incurred in its formation, and in the preparation of plans to be submitted to Parliament.”

The bill alleged, that, the plaintiffs having seen the prospectus, and having confidence in the defendants, several of

(a) The italics were in the original prospectus.

of whom, the plaintiffs had heard, were highly respectable and worthy individuals, and fully relying on the truth of the statements in the prospectus, and particularly on the statement that the capital of the company was to be £500,000, and that the traffic of the intended line would be such as was stated in the prospectus, and that the landowners on the line had been communicated with, and were most anxious for the successful carrying out of the objects of the company, and that there was no reason to expect that any parliamentary opposition would be offered, it occurred to the plaintiffs to apply for shares in the company; and that, inasmuch as it was doubtful what number of shares might be allotted to each of the plaintiffs, the plaintiffs agreed that they should be jointly interested in whatever number of shares might be severally allotted to them; and that, accordingly, the plaintiffs were induced to apply, and did in fact apply, for shares in the intended company.

That, in consequence of the favour with which the scheme was regarded by the public, the application for shares in the proposed undertaking, from solvent and responsible persons, who were both willing and able to accept and hold such shares as might have been allotted to them therein, were very numerous, and greatly exceeded the number of shares into which the capital of the intended company was divided; and that the defendants had ample opportunity to make up and complete the full amount of the capital of the company, by procuring solvent and responsible persons to accept and hold all the shares in the proposed undertaking; and that, on the 20th day of September, 1845, the defendants caused to be inserted the following advertisement in "The Times" newspaper, and in several other newspapers of that date:—

"Bridgwater and Minehead Junction Railway.—No fur-

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ther application for shares can be received in this undertaking."

That, a few days after the last-mentioned advertisement appeared in the newspapers, the plaintiffs received letters of allotments of shares in the intended company, duly issued by the managing directors, and signed by the secretary, the letters of allotments so received by the plaintiffs being for twenty-five, fifteen, and ten shares respectively. That the plaintiffs had paid to the bankers named in the letters of allotment £105, being the amount of the deposits at the rate of 2*l.* 2*s.* per share, and took from the bankers receipts for the amounts; but that, in fact, the whole of the £105 was the proper money of the plaintiff Cooper. That all the plaintiffs executed and subscribed the parliamentary contract and subscribers' agreement; and that, by these instruments, it was amongst other things provided, that the defendants, and W. S. Fitzwilliam, and James Colhoun should constitute and be the managing directors of the company; and that the capital should be £500,000, forty shares being the qualification of a managing director; and that, subject to the provisions of the act of the 7 & 8 Vict., and that indenture, the directors should have absolute and uncontrolled power to increase the capital of the company, and to deal with, alienate, dispose of, or affect the capital, property, and affairs of the company, the parties thereto consenting to the acts of the managing directors, so far as the same should be legal and consistent with the provisions of that indenture; and that the costs and expenses of the proposed undertaking should be paid by the shareholders of the company, and might be deducted out of the deposits paid.

That the plaintiffs were induced to execute the parliamentary contract and subscribers' agreement on the faith and understanding that all the defendants would execute the contract and agreement respectively, and take shares in the company, and pay their deposits thereon; and on the

faith of the statements in the prospectus being true in fact, and that the whole of the 25,000 shares into which the same was divided had been allotted, as was alleged and represented by the defendants, and that the whole amount thereof was taken up and the proper deposits paid thereon.

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That the managing directors of the company applied to Parliament, for the purpose of obtaining an act to enable them to construct the intended railway; but that, through the neglect of the defendants, or that of their surveyors or agents, in not making proper plans and sections, and in not delivering the proper notices, and also in consequence of the defendants not having obtained the assent of the principal landowners on the line, and in consequence of the statements as to the supposed traffic in the prospectus being false and incorrect, the sanction of Parliament could not be obtained for the formation and construction of the intended railway, or for the incorporation of the proposed company. That the defendants pretended that the bill for the formation of the railway and incorporation of the company was rejected in consequence of the factious opposition of Sir Peregrine Acland, Bart., one of the most extensive landowners on the line. The plaintiffs charged that several landowners of great influence on the line, whom they particularised, and stated to be the proprietors of nearly one-half of the lands required to be taken by the company, opposed the bill. They further charged, that on the 3rd of June, 1846, the secretary of the company, by the order and direction of the managing directors, sent the following circular to each of the plaintiffs:—

“ Bridgwater and Minehead Junction Railway and
Pier Company.

“ Report of the Directors.

“ The bill presented to Parliament having, through the factious opposition of a powerful landowner, and by the

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secret influence of rival interests, been rejected by the committee, after a protracted parliamentary contest, without any sufficient or satisfactory reason being assigned, the directors, although their original opinion of the undertaking has, by the evidence adduced before Parliament, been fully confirmed, have, after mature deliberation, which has been influenced by the consideration of the pressure in all pecuniary affairs relating to railway undertakings, thought it prudent to exercise the powers vested in them by the deed of settlement by declaring the company dissolved. The only duty which now remains for the directors to perform is to return to the shareholders the amount of their deposits, after deducting therefrom the expenses incurred on their behalf, and to submit the annexed statement of account, by which it will be seen, that, after discharging all the liabilities of the partnership, there remains for distribution 10s. 6d. per share; and this result has been arrived at after a patient examination of the various claims against them, and at the same time preserving due regard to the protection of themselves and their shareholders individually from future liability."

That, on the receipt of this circular, the plaintiffs for the first time discovered that the whole of the 25,000 shares had not been allotted and subscribed for, and that the deposits had only been paid on 16,555 of such shares, and that the defendants had diminished the amount of the capital of the company, and that some of the defendants had never executed the subscribers' agreement, or taken any share or shares in the company. That the plaintiffs would never have executed the subscribers' agreement if they had known that the defendants, or any of them, would not execute the same; and that by omitting or refusing to execute the subscribers' agreement, to which they had directed themselves to be made parties as aforesaid, the

defendants committed a fraud on plaintiffs, and the other *bonâ fide* subscribers to the undertaking who were induced to execute the same.

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That the defendants were compelled to borrow a considerable sum, at interest, from the bankers of the company, in order to make up a sufficient sum to pay the parliamentary deposit required by the standing orders of the House of Commons. That, in attempting to diminish the capital of the company, the defendants committed a fraud upon the plaintiffs and the other persons who had subscribed their money to the undertaking on the faith that the capital of the company was to be £500,000 at the least. That, at the time of their taking such shares in the intended company, they were expressly assured that all the shares in the company were taken. That, shortly after the letters of allotment had been sent, the plaintiff Cridland called on the solicitor for the company and inquired why no more than fifteen shares were allotted to him, and was informed by the solicitor that all the shares had been disposed of except 300 or 400, which the directors meant themselves to take. That at that time the shares were at a premium of 15*s.* per share. That some of the defendants, the directors whom the bill mentioned, never took any shares. That the defendants allotted to some of themselves shares which they sold at a premium before all the other shares had been allotted, and kept shares back with a view to increase the premium; and that among the expenses for which the defendants took credit in their accounts was a sum of 308*l.* 14*s.* 3*d.* for commission on selling scrip, which the plaintiffs verily believed was a commission on selling and buying in the scrip to rig the market; and the bill charged that the defendants had no power to expend the sums or incur the liabilities set forth in their accounts.

That the plaintiffs had declined accepting the sum of 10*s.* 6*d.* and signing the deed of release in the letter or circu-

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lar of the 23rd day of June mentioned or alluded to. The bill further charged, that the defendants never *bonâ fide* intended to carry into effect the proposed objects stated in the prospectus, and that they never made the proper and necessary inquiries to ascertain the truth of the statements and allegations therein contained. It also charged, that the defendants proposed and carried on the scheme quite regardless of the interests of the public or of the plaintiffs, and for the sole purpose of selling at a premium the shares they might allot to themselves and their friends; and that, under the circumstances therein mentioned, and from the defendants having had the sole control of the affairs of the company, and having all the books and papers relative to the same in their possession, and from many of the circumstances aforesaid being within the personal knowledge of the defendants and the other persons, the plaintiffs could not obtain such effectual relief in the matters aforesaid in a court of common law as in a court of equity. And the bill charged, that plaintiffs were totally ignorant of the names and addresses of such persons, if any such there were, as had taken shares, other than the parties to the suit. The prayer was, that the defendants might be ordered or decreed to pay to the plaintiffs the sum of £105, being the amount of the deposits so paid by plaintiffs in respect of the shares so allotted to them respectively in the proposed company or undertaking as aforesaid, together with interest thereon; and that the defendants might be ordered to pay to the plaintiffs the costs of the suit.

Mr. *Swanston* and Mr. *T. H. Terrell*, in support of the demurrer.—There is a misjoinder of plaintiffs, for the case stated is, that there were three distinct applications and three distinct allotments. There are, therefore, three distinct cases, each of which may admit of a different defence, and ought not to be joined in the same bill. The allega-

tion in the bill, that the plaintiffs are jointly interested, can make no difference, for that is an inference of law, and the demurrer only admits the matters of fact pleaded. If they were in fact jointly interested, still, as it is not alleged that this fact was known to the defendants, it would not prevent the three cases from being perfectly distinct as regards the defence to them. From the allegation, that one of the plaintiffs paid all the deposits, it only follows that the others are not interested or are differently interested. The case falls within the principle of *Jones v. Garcia del Rio* (a).

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But the bill cannot be sustained on the substance of the case. A distinct case of fraud must be alleged against the defendants personally, to entitle the plaintiffs to relief on the ground of fraud, and no such case is made by the bill. The plaintiffs' remedy, if any, is at law, this case being in substance an action for money had and received. [The *Vice-Chancellor* referred to *Colt v. Wollaston* (b).] In that case the evidence shewed a case of clear fraud, and the judgment of the Court proceeds upon that ground. Here no facts are alleged amounting to a fraud, and a mere charge that conduct is fraudulent, which, upon the facts stated, does not appear so, will not protect a bill from demurrer. Moreover, the bill seeks accounts of the application of the money subscribed, and charges that the funds have been misapplied; all of which are immaterial if the plaintiffs repudiate the contract on the ground of fraud.

Mr. *Russell* and Mr. *R. W. E. Forster* appeared for the plaintiffs, but were not called upon.

THE VICE-CHANCELLOR:—

It may be that the bill contains allegations and charges

(a) Turn. 297.

(b) 2 P. Wms. 154; and see *Green v. Barrett*, 1 Sim. 45; *Sed-*

don v. Connell, 10 Sim. 74; *Harvey v. Collett*, 15 Sim. 332.

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which are, in some respects, not clear; which are, in some respects, not distinct; and which are, in some respects, apparently contradictory. The question, however, is, whether, taking the whole together, and not treating the separate parts of the pleading with too much rigour, there is not to be collected a substantial allegation that money was obtained from the plaintiffs by misrepresentation and fraud. If it be assumed, as I am bound to assume, that the statements of the bill are true, they would, I think, entitle the plaintiffs to a decree. Nor does the objection as to misjoinder appear to me tenable. Upon the whole, there appears sufficient to sustain the bill; and I, therefore, overrule the demurrer, but without costs, and without prejudice to any question in the cause.

An appeal from this decision was heard before the Lord Chancellor, March 11, 1848, when the Vice-Chancellor's judgment was affirmed.

The LORD CHANCELLOR, after referring to the allegations in the bill, that the plaintiffs agreed among themselves to apply for allotments of shares, and that they would take the shares jointly, and that the party in whose name they might be taken should be considered as holding the shares for the whole, said, that upon those allegations repeated two or three times in the course of the bill, the plaintiffs were all interested in every share, and that was the mode in which their joint interest was created. How could it be said to be an improper joinder if every party was interested in every share, and had a valuable interest in every share, according to the allegation? The names as they stood merely shewed who were the trustees for the plaintiffs. It was quite a different thing from what it would be (and even then his Lordship did not see that the objection would hold) if the parties upon an allega-

tion in the bill appeared to be shareholders, not suing on behalf of themselves and other persons. After referring to the principal allegations in the bill, his Lordship said that this was a case in which the plaintiffs stated the prospectus holding out certain advantages to the public, the principal facts being, that the capital of the company was to be £500,000, that there were to be 25,000 shares, and that the proprietors of the land through which it would pass were desirous that the railway should be carried into effect. It was upon the faith of those representations that they took their shares. Instead of the 25,000 shares having been allotted, only 16,000 were taken; instead of £500,000, being the capital proposed to be raised, it was considerably diminished; and instead of the landowners being willing to concur in the railway passing over their land, the proprietors of nearly one-half of the lands required to be taken opposed it, and caused the bill to be rejected; and owing to all these representations, they stated on the face of the bill, they had parted with their money, which they now sought to recover back. If those facts were proved, a case would be made which would entitle the parties to equitable relief, and therefore the demurrer could not be supported.

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ABBAY v. HOWE.

Bequest of residue, in moieties, in trust for two tenants for life, and at the death of each in trust, as to her moiety, to the children of the two who should be living at the death of the deceased tenant for life, and the issue of such of the children as should then be dead :—*Held* to take effect *per capita*.

RICHARD ATKINSON, by his will, bequeathed his residuary estate to trustees, upon "trust to pay the interest, dividends, and proceeds, to arise from one moiety or half part of all the said principal monies, when and as the same shall become due and be received, to my said daughter Sarah Wiseman, for and during the term of her natural life; and, from and after her decease, upon trust to pay one equal moiety or half part of all the said principal monies unto and equally amongst all and every the children of my said daughters, Sarah Wiseman and Susannah Kettlewell, which shall be living at the death of my said daughter Sarah Wiseman, and the lawful issue of such of them as shall be then dead, share and share alike: and upon further trust, that they, my said trustees, do and shall pay the interest, dividends, and proceeds, to arise from the remaining moiety or half part of the said principal monies, when and as the same shall become due and be received, unto my said daughter Susannah Kettlewell, for and during the term of her natural life; and, from and after her decease, upon trust to pay the said remaining moiety or half part of the principal monies unto and equally amongst all and every the said children of my said daughters, Susannah Kettlewell and Sarah Wiseman, which shall be living at the death of my said daughter Susannah Kettlewell, and the lawful issue of such of them as shall be then dead, share and share alike. And it is my will and mind, that in case any of the children of my said daughters, or either of them, or their issue, shall be under the age of twenty-one years at the death of my said daughters, or either of them, then and in every such case I do hereby empower my said trustees, or the survivor of them, his executors or administrators, to lay out and apply the interest of the share or shares of such child or children,

his, her, or their issue, in the maintenance and education of such child or children, or other issue, during their respective minorities.”

Susannah Kettlewell survived Sarah Wiseman, and died in March, 1844.

Susannah Kettlewell had eight children, of whom six were living at her death. Of the other two, one died without having had a child, and the other died leaving one child, who died in 1843, having had five children.

Sarah Wiseman had eleven children, of whom nine survived Susannah Kettlewell; of the others, one died, and the other left two children.

The question was, whether the children of the tenants for life, and the issue of the deceased children, took *per stirpes* or *per capita*.

Mr. *Swanston*, Mr. *Stinton*, Mr. *Bichner*, Mr. *Greene*, and Mr. *Kennion* appeared for the different parties.

The following cases were cited:—*Armstrong v. Stockham* (a), *Price v. Lockley* (b), *Butler v. Stratton* (c), *Booth v. Vicars* (d), *Flinn v. Jenkins* (e), *Shater v. Graves* (f).

THE VICE-CHANCELLOR:—

I assume all the cases cited to have been rightly decided. What I should have done if the gift had been to all the children of Susannah Kettlewell and Sarah Wiseman, or the lawful issue of such of them as should be then dead, I do not say. If the will had been so framed, I should very possibly have adopted the construction for which Mr. *Swanston* has contended. But the gift is to and equally amongst all and every the children which shall be living at

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| (a) 7 Jur. 230; and see <i>Brett v. Horton</i> , 4 Beav. 239. | <i>Tomlin v. Hatfield</i> , 12 Sim. 167. |
| (b) 6 Beav. 180. | (d) 1 Coll. 6. |
| (c) 3 Bro. C. C. 367; and see | (e) Ibid. 365. |
| | (f) 11 Jur. 485. |

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the death mentioned, and the lawful issue of such of them as shall be then dead, share and share alike. I think that this must be taken to mean a division *per capita*, and not to warrant any other interpretation. With regard to the maintenance clause, it is rather in favour of Mr. *Swanston's* construction than adverse to it, but is not sufficient to support that construction. The distribution must be *per capita*.



July 14th &
20th.

An attorney held bound to discover when and to whom he parted with documents of title of his client, and in whose possession the same were.

BANNER v. JACKSON.

THIS case came on upon exceptions to the Master's report, allowing exceptions to the answer of one of the defendants, named George Harris Gardner, who was the attorney of another defendant, named John Jackson.

The plaintiffs sought by their bill the delivery up by the defendants of the documents of title of certain customary lands (held of the manor of Ambleside) which had been devised to the plaintiffs, but which the defendant Jackson claimed, adversely to them and to their testator. Judgment had been given in favour of the plaintiffs' testator, in an action of ejectment against the defendant Jackson.

The bill inquired whether the defendants, or either, and which of them, had not lately, or ever, and when last, in their, or one, and which of their possession, custody, or power, any, or one, and which of the title-deeds, evidences, or muniments of title of or relating to the customary premises, or any and what part or parts thereof; and whether they, or either and which of them, had not ever, and when, seen, and in whose possession, custody, or power, and on what occasion or occasions, and under what circumstances and where, any, or one, and which of such title-deeds, evidences, and muniments of title; and whether the defendants,

or either and which of them, had not any and what reason to know, believe, or suspect where, or in whose possession, custody, or power, the same, or any, or one, and which of the title-deeds, evidences, and muniments of title then were or was; and prayed that the defendants might set forth a full and true list or schedule of all such title-deeds, evidences, and muniments of title as were not then, but formerly, or ever were in their or either, and which of their possession, custody, or power, and when the same, and each and every of them, were last in their or either, and which of their possession, custody, or power; and why, and to whom, and on what occasion, and for what purpose, the defendants, or either and which of them, parted with the same, or any, or one, and which of them, and where the same, and each and every of them, then were, or were for any and what reason believed or suspected by the defendants, or either and which of them, to be, and what had become thereof, or was for any and what reason believed or suspected to be by the defendants, or either and which of them, to have become thereof; and what were their contents.

The answer of the defendant Gardner to these interrogatories was, that, as to certain of the documents mentioned in the bill, and which the answer specified, the defendant sent and delivered them up to an agent of the plaintiff's, therein mentioned; but the defendant said, that he had lately in his custody and possession, as the attorney-at-law and solicitor of the defendant Jackson, divers title-deeds, evidences, and muniments of title of or relating to the customary premises mentioned in the bill; and that he, by the authority of Jackson, on the 8th day of August, 1846, parted with the possession of all the deeds, evidences, and muniments so deposited with him, except those therein-before mentioned to have been delivered to the defendant's agent; and that none of the deeds, evidences, and muniments of title relating to the said customary premises were,

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or was then, or since the respective times when the defendant parted with the possession thereof as aforesaid, or either of them, been in the possession, custody, or power of the defendant; nor had the defendant seen the same, or any of them; and that the defendant parted with the possession of all the deeds, evidences, and muniments of or relating to the customary hereditaments as were delivered to him by John Jackson as aforesaid, save the four several deeds and writings thereinbefore stated to have been given up by the defendant to the plaintiffs as aforesaid, on or about the 8th day of August, 1846, and prior to the trial of the action at law thereinbefore in that behalf mentioned, and under the authority of John Jackson, and had not since had, nor then had, the same or any of them in his possession, custody, or power; and he insisted, that, having received the same as the solicitor of John Jackson, and having parted with the same under the authority of John Jackson, in that behalf as aforesaid, he was not bound to set forth whether he had or had not any reason to know or believe, or suspect where, or in whose possession, custody, or power, the same, or any, or one, or which of the same title-deeds, evidences, and muniments of title then were or was; nor to set forth a full and true or any list or schedule of all such title-deeds, evidences, and muniments of title as were not then, but formerly, or ever were, in his possession, custody, or power, or, save aforesaid, when the same, and each and every of them, were last in his possession; or why, or to whom, or on what occasion, he parted with the same or any of them; or where the same, and each and every of them, then were, or were for any and what reason believed or suspected to be, or what had become thereof, or what was for any and what reason believed or suspected by the defendant to have become thereof; or what were their contents. And the defendant said that he had not then, nor had he ever, in his possession, custody, or power, any other title-deeds, evidences or evidence, muni-

ments of title or muniment of title, of or belonging to the customary premises; and the defendant said, that he acted in the several matters in the bill thereinbefore in that behalf mentioned as the attorney and solicitor of John Jackson, and that he had no knowledge of the same, or any of them, other than such as was acquired by him of the same as the attorney and solicitor of John Jackson; and the defendant claimed the benefit of such objection, as if he had taken advantage of the same by way of plea or demurrer to the discovery and relief sought and prayed against him by the plaintiffs in the bill; and the defendant said, that John Jackson was a defendant to the bill, and was resident, as the defendant believed, within the jurisdiction of the Court, and that such residence of John Jackson was well known to the plaintiffs and their solicitor, or some of them; and that John Jackson had not, as yet, been served with any process in the suit.

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Mr. *Thomas Parker*, sen., in support of the exceptions to the report, contended, that the matters inquired after by the interrogatory, and as to which it was not answered, were privileged transactions between the defendant and his client.

Mr. *Eddis*, for the plaintiffs, contended, that, at all events, the defendant was bound to set forth when and to whom he had parted with the documents. That was not a transaction between him and his client, nor had ever been held to fall within the protection extended to professional communications. In *Stanhope v. Knott* (a), it was held, that it was not sufficient for a defendant to plead that he knew nothing of the documents of which a discovery was sought, except as counsel, without divesting himself of

(a) 2 Swanst. 221, note.

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them, and disclosing to whom he had delivered them.—[He also cited *Kington v. Gale* (a).]

The VICE-CHANCELLOR :—

In *Jones v. Pugh* (b), Lord *Lyndhurst* held, that an attorney who was a defendant could not be compelled to disclose the names of his clients, as a trustee for whom he had taken a mortgage. One of the questions in the present case is, whether, if a client tells his attorney to send his title-deeds to a third person, the attorney must disclose to whom he delivered them. The very object of the client may be to keep that fact from the knowledge of his adversary.

Mr. *Eddis*.—Another circumstance to be adverted to is, that the plaintiffs have established their title to the land at law, and, therefore, the defendant held the documents as their trustee. In the cases cited the client had a legal title.

The VICE-CHANCELLOR said he would look into the pleadings, and give his decision in a few days.

July 20th. On this day, his HONOR said, that the substantial question was, whether, as relief was sought against the defendant Gardner as well as against the defendant Jackson, personally and directly, the former could decline to answer, on the ground of professional confidence. Looking at the whole of the record, it appeared to his Honor a point of much nicety and difficulty. His inclination was against the plaintiff, from the view he had always taken of the importance of limiting, as far as possible, the power of compelling a solicitor to disclose facts which become known

(a) Rep. temp. Finch, 259 ; and see Hare on Discovery, 172.

(b) 1 Phil. 103.

to him in that character. But the cases of *Stanhope v. Knott*, and *Kington v. Gale*, seemed to govern the present; and, on those authorities alone, his Honor thought the defendant must answer to whom, and on what occasion, and for what purpose, he parted with the documents, and where the same were. The exceptions to the Master's report must be overruled; but, as they were fairly taken, the deposit must be returned. The plaintiffs' costs to be costs in the cause, and the defendant to have six weeks to answer.

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The defendant Gardner afterwards put in a further answer, stating, that on August 8, 1846, he had, with the authority of the defendant Jackson, and as his solicitor, deposited the title-deeds of the property with Messrs. Wakefield, Crewdson, & Co., bankers, at Kendal, to secure the repayment of any overdrawing of his account. The plaintiffs applied to the bankers, and obtained the deeds; and the suit was then, by consent, dismissed, without costs, except those of the motion to dismiss, which were paid by the plaintiff.

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July 16th &
19th.

A testator devised freehold estates upon trust to sell, with a declaration that the monies to arise from such sale should be deemed part of his personal estate, and that the income thereof, till sale, should be considered as part of the income of his personal estate, and be subject to the disposition of his personal estate thereafter made. The testator then gave his personal estate upon trust for four persons, as tenants in common. By a codicil, the testator revoked the residuary gift to one of the four, who was also the testator's heir-at-law and customary heir:—*Held*, that the heir was entitled to so much of the lapsed residue as consisted of real estate.

Bequest of personal estate, upon trust to assign the same to four persons, "and to each of their respective heirs, executors, administrators, and assigns:"—*Held* to create a tenancy in common.

GORDON v. ATKINSON.

THOMAS WRIGHT, by his will, dated the 8th of November, 1836, devised his freehold and copyhold estates to his wife, Mary Harwood Wright, and three other trustees, their heirs, sequels in right, and assigns, upon trust, if and when they, or the survivors or survivor of them, or the heirs, sequels in right, and assigns of such survivor, should deem it advisable to do so, to sell the same, or any part or parts thereof; and, after giving usual powers, the testator proceeded thus:—"And my will further is, that the monies which shall arise from such sale or sales shall be deemed to be part of my personal estate; and that the clear yearly rents and profits of the said messuage, lands, tenements, and hereditaments hereby made saleable, until the same respectively shall be sold, shall also be considered as part of the income of my said personal estate; and that such purchase-monies, and rents, and profits, shall be subject and liable to the disposition hereinafter made concerning my personal estate, and the annual income thereof, and charged and chargeable in such and the same manner as my said personal estate."

The testator bequeathed all his personal estate (except such parts as he had specifically bequeathed, or should specifically bequeath) to the same trustees, upon trust to convert the same into money, and to stand possessed of such money, as should come to their hands by virtue of the trusts of that his will, upon trust, after payment of the testator's funeral and testamentary expenses, and debts and legacies, to invest the same in their, or his, or her own names or name, at interest, upon Government or real security; and to be possessed of the same, upon trust to pay the interest, dividends, and annual

of their respective heirs, executors, administrators, and assigns:"—*Held* to create a tenancy in common.

proceeds unto his said wife, until she should marry again, and then, upon trust, to pay his said wife an annuity of £200; and, after the death or second marriage of his wife, upon trust for his children. And, in case the testator should have no child, or of the death of all of them without attaining a vested interest, the testator declared that the said trustees should stand possessed of the same trust-funds, upon trusts thus expressed: "Upon trust, to pay, assign, and transfer the same trust-monies, stocks, funds, and securities unto my nephew, Stephen Kelso, my son, John Robert Kelso, my nephew, William Clarke Wright, and to my nephew, Thomas Wright Mathews, and to each of their respective heirs, executors, administrators, and assigns." The testator appointed his said wife, and the other three trustees, executors of his will.

Stephen Kelso, one of the residuary legatees in the will named, died on the 19th of March, 1839.

The testator, by a codicil to his will, dated the 23rd of October, 1839, after giving certain pecuniary legacies and annuities, declared, that, in consequence of the death of his nephew, Stephen Kelso, he thereby revoked all former grants and legacies or otherwise, made to Stephen Kelso, in the will, as one of the testator's residuary legatees, and as one of the executors named therein, and nominated, and appointed in his place, the testator's nephew, Thomas Wright Mathews, to be an executor of the will, jointly with the executors named therein; and he also declared, that, in consequence of an annuity granted to Charlotte, the wife of William Clarke Wright, and also of a legacy to his children, he, the said testator, thereby revoked all legacies and other grants, made to him, the testator's said nephew, as residuary legatee or otherwise, in his said will; and the testator thereby nominated Shallett John Dale an executor and trustee to his said will, jointly with all his other executors, in the will named.

The testator died on the 18th of March, 1840, leaving

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William Clarke Wright his heir-at-law, and also customary heir, him surviving.

John Robert Kelso and Thomas Wright Mathews survived the testator.

The will and codicil were, shortly after the testator's death, proved by his widow, and Thomas Atkinson, Henry Dale, Thomas Wright Mathews, and Shallett John Dale.

No part of the testator's freehold or copyhold estates were sold or converted into money.

The bill in this cause was filed by the testator's widow (who had married again, and had retired from being a trustee of the will), by her next friend, against the trustees of the testator's will, the testator's heir-at-law and his next of kin, and claimants under them, and the widow's second husband, and the trustees of their marriage settlement; and, also, against John Robert Kelso and Thomas Wright Mathews. It sought the usual accounts, and a declaration of the rights of the parties.

The case now came on upon further directions.

Mr. *Russell*, Mr. *Bacon*, and Mr. *Heathfield*, for the plaintiff:—

The case is decided by the authority of *Phillips v. Phillips* (a), which has never been overruled; and where Sir *J. Leach* decided, that the same expression as is used in this will was sufficient to produce a conversion out and out.

But in this case, the argument is stronger as against the heir-at-law than it was in *Phillips v. Phillips*; for, by his codicil, the testator expressly takes away the share of his property given to Mr. William Clarke Wright, his heir-at-law, by his will. It is an inconsistency that he should do so, if the same property is to revert, upon such revocation, to the same person in his character of heir-at-law.

(a) 1 My. & K. 650.

Now, the Court will presume that the testator knew who was his heir-at-law, and the conclusion follows, that the testator intended an entire conversion of his property, and that it should go as personalty to the testator's next of kin.

Also, the residuary bequest created a tenancy in common between the residuary legatees. The gift as to the four persons by name, "and to their respective heirs, executors, administrators, and assigns;" from which the intention of the testator is apparent that the share of each should not survive, but should go to his own representatives. There is, therefore, an intestacy as to those shares.

Mr. *Wigram* and Mr. *Robertson*, for the defendant, Kelso, one of the surviving residuary legatees :—

These defendants concur with the plaintiffs in insisting that the terms of the devise of the real estate amounted to an entire conversion of the testator's real estate into personalty; but he claims a moiety of the entire residue, for the gift to the four was in joint-tenancy.

They cited *Cresswell v. Cheslyn* (a), and *Harris v. Davis* (b), for the observations of the Court in that case, and *Shaw v. MacMahon* (c).

If the gift did not create a joint-tenancy in toto, it made the four joint-tenants for life, with several interests in remainder to their respective personal representatives. This, beyond doubt, would have been the construction of such a limitation as the present, of real estate: *Barker v. Gyles* (d); *Humphrey v. Tayleur* (e); *Doe d. Littlewood v. Green* (f); and if the difference, that here the gift is of personalty,

(a) 2 Eden, 123. The same was affirmed in Dom. Proc.; see 3 Bro. P. C., Toml. ed., 246; but Serjt. *Hill* questioned the correctness of the decision: see Lord *Henley's* note.

(b) 1 Coll. 416.

(c) 2 Con. & Law. 528.

(d) 2 P. Wms. 280.

(e) Amb. 136.

(f) 4 M. & W. 229. See also Litt. Ten. s. 296.

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creates no distinction, which it does not, *Doe d. Littlewood v. Green* governs this case.

Though this will was executed anterior to the Will Act(a), the codicil was executed after the commencement of the operation of that act; and sect. 34 brings the will within its provisions; now, according to sect. 24, the will must be construed as speaking at the death of the testator; and must, by sect. 25, operate so as to pass such parts of the residue as otherwise would have lapsed.

Mr. *James Parker*, Mr. *Walpole*, and Mr. *Malins*, for the defendant, W. C. Wright, the heir-at-law, were not called on.

Mr. *K. S. Parker*, Mr. *W. Hislop Clarke*, and Mr. *J. A. Cooke*, appeared for the other parties.

The VICE-CHANCELLOR thought it unnecessary to refer to the provisions of the Wills Act in the consideration of the case. His Honor said that the argument, that the residuary bequest created a joint-tenancy, was ingenious; but he considered that the gift, by the will, of the residue, was to the four as tenants in common; and that, first, by the death of one residuary legatee, and next by the codicil which took from another residuary legatee, a living person, his share, without giving it to any one else, there had arisen an intestacy as to two-fourth parts.

As to the question, whether the heir was entitled to so much of the residue as consisted of real estate, his Honor said he had referred to *Lady Bristol's case* (b), which, as it stood in Vernon, would be weighty, if not conclusive. But Mr. Cox, in a note to *Rogers v. Rogers* (c), had questioned the accuracy of the report of that case. His Honor said he had referred to the Registrar's book, and it appeared that the co-heirs and the representatives

(a) 1 & 2 Vict. c. 26.

gerford, 2 Vern. 645.

(b) *Countess of Bristol v. Hun-*

(c) 2 P. Wms. 194.

as to personalty were the same persons; and, therefore, whatever the decision in that case was, it was unnecessary there to determine in what character the parties took. He had also referred to the judgment of Lord *Thurlow*, in *Robinson v. Taylor* (a). It was incumbent on the next of kin to shew that the testator intended to effect the conversion for all purposes. Their argument was plausible; but it was not sufficiently strong to establish their case against the heir.

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By the decree, it was declared that the testator died intestate as to the two shares of Stephen Kelso and W. C. Wright, in the residue of his freehold, copyhold, and personal estates, subject only to the interest of the plaintiff, the testator's widow, therein; and that, as to so much thereof as consisted of freehold or copyhold, or of the produce of the conversion thereof, the same vested, at the testator's decease, in the said W. C. Wright, as his heir-at-law, and customary heir; and as to so much thereof as consisted of personal estate, it belonged to the plaintiff, the testator's widow, and the next of kin. The costs to be paid rateably out of the real and personal assets.

(a) 2 Bro. C. C. 589; see p. 594.

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Where a cause has been transferred from one branch of the Court to another, the latter will not question the correctness of the exercise of judicial authority by the former on a previous application.

But where it appears that a plaintiff, on obtaining *ex parte* an injunction from one branch of the Court, had withheld information which might have induced that branch of the Court to make a different order, the injunction so obtained may be dissolved on that ground by another branch of the Court to which the cause has been transferred.

STURGEON v. HOOKER.

THE plaintiff was the assignee of the estate of an insolvent debtor, named James Hooker, who, in 1834, was discharged, under the provisions of the acts for the relief of insolvent debtors, and who afterwards went to Hong Kong, and, having acquired some property, died there in 1847 intestate. The widow of the insolvent took out letters of administration to his estate in this country. The Registrar of the Supreme Court at Hong Kong realised assets of the insolvent to the amount of £1300, and transmitted that amount to the provisional assignee of the Insolvent Debtors' Court, who paid the same into the Bank of England to the credit of the insolvent's estate.

The plaintiff by his bill (which was filed on behalf of himself and of the other creditors of the deceased insolvent against the administratrix and against the provisional assignee of the Insolvent Debtors' Court) sought the usual accounts of the intestate's debts and of the assets in the hands of the defendant; that the intestate's assets might be applied in payment of the debts contracted subsequently to the insolvency and his funeral and testamentary expenses, &c., and then in payment of the debts due to the plaintiff and the other creditors mentioned in the insolvent's schedule. The bill further prayed, that the £1300 might be properly secured, also for a receiver, and for an injunction to restrain the provisional assignee from paying, and the administratrix from receiving, the £1300.

On the 13th of May, 1847, the plaintiff obtained, upon an *ex parte* application to the Vice-Chancellor of England, an injunction in the terms of the prayer, but did not bring before the Court the fact of the payment of the £1300 into the Bank to the credit of the insolvent's estate.

The cause was shortly afterwards transferred, and became attached to this branch of the Court.

A motion was then made, upon notice, on behalf of the defendant Hooker, before the Lord Chancellor, to dissolve the injunction, but his Lordship declined to hear the motion (*a*).

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Mr. *James Parker* and Mr. *Selwyn* now moved before his Honor, upon notice, on behalf of the defendant Mrs. Hooker, that the injunction might be dissolved. First, because the facts, as they had been presented to the Vice-Chancellor of England, did not entitle the plaintiff to the injunction; and, secondly, on the ground of the payment of the £1300 to the proper account at the Bank of England not having been brought before the Court, although known to the plaintiff.

Mr. *Russell* and Mr. *Hallett*, for the plaintiff, submitted that there had not been any intentional suppression by the plaintiff of any material fact.

The VICE-CHANCELLOR:—

I am of opinion, that I am without jurisdiction as to the question, whether, upon the materials that were before the learned judge, who made the order and granted the injunction in question, it was a right or correct exercise of judicial authority on his part to do so; and, therefore, upon that question, I do not take the liberty of intimating any opinion.

But I conceive it to be in the present case shewn, that the plaintiff, when he applied for the injunction, had in his power material information relating to the subject, which it was his duty to communicate to the Court on that occasion, and which information he did on that occasion not communicate by affidavit or otherwise to the Court. I think, so far as I can form an opinion upon the subject, that, if that in-

(*a*) See *Sturgeon v. Hooker*, 2 Phil. 289.

The three surviving sons of the first testator, and the devisees in trust of the second, were the plaintiffs.

By the Great Northern Railway Act, 1846, with which is incorporated the Lands Clauses Consolidation Act, 1845, the Great Northern Railway Company were empowered to construct their railway upon a portion of the land devised by the above-mentioned will.

On the 30th January, 1847, the Company's solicitors addressed to the plaintiffs, James George Langham, John Mackie Langham, Samuel Frederick Langham, and to four other persons, named Thomas Ingleby, Richard Porter, James Tyler, William Grover, and to all and every person and persons whom it might concern, a notice "that the line of the railway would pass through the plaintiffs' messuages, lands, and hereditaments therein referred to, as distinguished by the numbers 504, 586, 589, 515, 515a., and 589, and containing altogether 4A. 1R. 1P., and that it was the intention of the Company to take and use the same messuages, lands, and hereditaments, and that it was the intention of the Company to contract for, and that they were then willing to treat and agree for the purchase thereof, and of all subsisting leases, terms, estates, and interests therein, and required the delivery to the Company, or their agents, of a schedule of all the plaintiffs' title-deeds to the property, and a statement in whose custody the same were." In consequence of this notice the plaintiffs employed a valuer, who surveyed the lands mentioned in the notice, and valued them at 7960*l.* 15*s.*, and communicated to Mr. George Smith, the Company's surveyor, the result, and the willingness of the three first-mentioned plaintiffs to sell to the Company their property at or about that price.

The Company, by their agent, Mr. Smith, offered the sum of £3300, and no more, for the entirety of the messuages, lands, and hereditaments of the plaintiffs, and refused to pay any higher price for such property. The secretary of the Company thereupon signed and delivered

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to the plaintiffs, on the 12th April, 1847, a printed notice, dated the 9th day of April, and addressed to all the plaintiffs, two of them, William Mansfield and George Wagstaff, being therein described as devisees in trust of William Langham, the younger, deceased.

The notice stated that the Company required to purchase and take, for the purposes of their railway, the property therein described, and that the Company were then willing to treat and agree for the purchase thereof, and of all subsisting leases, terms, estates, and interests therein, and as to the compensation to be made to all parties for the damage that might be sustained by them by reason of the execution of the works of the railway, and called for the particulars of plaintiffs' estates and interests in the property, and the amount of the same, which the plaintiffs were willing to receive for the property, and a schedule of plaintiffs' title-deeds, and a statement in whose custody such title-deeds were, following the same or nearly the same terms or expressions as had been used in the notice dated the 30th day of January, 1847.

The notice of April, 1847, was the first that had been sent to, or received by, or on the part of plaintiffs, William Mansfield and George Wagstaff, or either of them, from or on the part of the Company, of their intention to take the lands.

The plaintiffs, William Mansfield and George Wagstaff, on the 24th April, 1847, sent to the Company's solicitors an answer, of which the material part was as follows :—

“ We beg to inform you, that, as devisees in trust under the will of the late William Langham, (the son of the late William Langham, the original owner of the property,) we claim to be entitled to one undivided fourth part, share, and interest of and in the freehold property in question ; and Messrs. Farebrother, Clark, & Lye having reported to us that the value of the entirety of the property, exclusive of

fixtures to be taken at a valuation, and also exclusive of surveyors' and law charges, amounts to the sum of £8693, we are willing to receive the sum of 2173*l*. 5*s*., being one-fourth part of the sum of £8693, in satisfaction and compensation for such undivided one-fourth share and interest in the property."

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The Company having refused to purchase the other three-fourth parts of the lands at the price demanded, the other three plaintiffs sent to the Company's solicitors a letter dated 30th April, 1847, stating, that with respect to the notice of the 9th April, they claimed to be, and were the owners of, three undivided fourth parts of the freehold property in question, as devisees in fee; and that, as they were informed that the plaintiffs, Messrs. Wagstaff & Mansfield, were advised that their one-fourth part was worth 2173*l*. 5*s*., the plaintiff, S. F. Langham, in the name of Messrs. Langham, claimed, and were willing to receive, 6519*l*. 15*s*. in satisfaction and compensation for their three undivided fourth parts of the property.

The Company declined to purchase the property in question, or either of the undivided parts therein, at the price at which the same was valued.

On the 28th May, 1847, the Company delivered to plaintiffs another printed notice, which was headed—"Notice of Intention to summon a Jury"—and was signed by the secretary to the Company. It was dated the 27th of May, and was addressed to all the plaintiffs, and purported to give them notice of the intention of the Company, at the expiration of ten days, or as soon after as might be, to issue their warrant to the sheriff of the county of Middlesex, requiring him to summon a jury, for the purpose of assessing the sum of money to be paid for the purchase of the plaintiffs' property, and for assessing the money to be paid as compensation for severance and other injury; and the notice then

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proceeded to offer £8300 for the purchase of the plaintiffs' interest in the property.

On June 8th the plaintiffs gave notice to the Company's solicitors that they required the question of compensation to be tried by a special jury.

No intimation having been given of the Company having issued a warrant for summoning a jury, the plaintiffs, on June 22, wrote to the Company's solicitors, asking when it was their intention to issue the warrant to the sheriff.

On the 24th of June the Company's solicitors sent an answer, expressing their intention to summon a jury within a few days, but saying that they could not state the precise time at which the jury would be held.

The plaintiffs stated, by their bill and affidavit, that, relying upon the intimation of the Company's solicitors of their intention to summon a jury, the plaintiffs allowed Hilary Term to pass without applying for a mandamus to compel the Company to proceed with the jury process, which the plaintiffs would otherwise have certainly done.

On the 15th of July the Company delivered to the plaintiff, Samuel Frederick Langham, a bond under the seal of the Company, and under the hands and seals of Robert Baxter and Philip Rose, two of their solicitors, dated the 14th day of July, 1847 (a).

(a) The following are the sections of the 8th Vict. c. 18, referred to in the case. Sect. 85, "Provided always, that if the promoters of the undertaking shall be desirous of entering upon and using such lands before an agreement shall have been come to, or an award made, or verdict given, for the purchase-money or compensation to be paid by them in respect of such lands, it shall be lawful for the promoters of the undertaking

to deposit in the Bank, by way of security, as hereinafter mentioned, either the amount of purchase-money or compensation claimed by any party interested in, or entitled to sell and convey such lands, and who shall not consent to such entry, or such a sum as shall be by a surveyor, appointed by two justices, in the manner hereinbefore provided in the case of parties who cannot be found, be determined to be the value of

The bond expressed that the Company, and Robert Baxter and Philip Rose, were held firmly bound to plain-

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such lands, or of the interest therein which such party is entitled to or enabled to sell and convey, and also to give to such party a bond under the common seal of the promoters, if they be a corporation; or if they be not a corporation, under the hands and seals of the said promoters, or any two of them, with two sufficient sureties, to be approved of by two justices, in case the parties differ, in a penal sum equal to the sum so to be deposited, conditioned for payment to such party, or for deposit in the Bank for the benefit of the parties interested in such lands, as the case may require, under the provisions herein contained, of all such purchase-money or compensation as may in manner hereinbefore provided be determined to be payable by the promoters of the undertaking in respect of the lands so entered upon, together with interest thereon, at the rate of £5 per cent. per annum, from the time of entering on such lands until such purchase-money or compensation shall be paid to such party, or deposited in the Bank for the benefit of the parties interested in such lands, under the provisions herein contained; and upon such deposit by way of security being made as aforesaid, and such bond being delivered or tendered to such non-consenting party as aforesaid, it shall be lawful for the promoters of the said undertaking to enter upon and use such

lands without having first paid or deposited the purchase-money or compensation in other cases required to be paid or deposited by them before entering upon any lands to be taken by them under the provisions of this or the special act. The purchase-money or compensation to be paid for any lands to be purchased or taken by the promoters of the said undertaking from any party who, by reason of absence from the kingdom, is prevented from treating, or who cannot after diligent inquiry be found, or who shall not appear at the time appointed for the inquiry before the jury, as hereinbefore provided for, after due notice thereof, and the compensation to be paid for any permanent injury to such lands, shall be such as shall be determined by the valuation of such able practical surveyor as two justices shall nominate for that purpose, as hereinafter mentioned. Upon application by the promoters of the undertaking to two justices, and upon such proof as shall be satisfactory to them that any such party is, by reason of absence from the kingdom, prevented from treating, or cannot, after diligent inquiry, be found, or that any such party failed to appear on such inquiry before a jury as aforesaid, after due notice to him for that purpose, such justices shall, by writing, under their hands, nominate a practical surveyor for determining such com-

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tiffs, James George Langham, Samuel Frederick Langham, and John Mackie Langham, and William Mansfield and George Wagstaff, in the penal sum of £3300 of lawful money, to be paid to James George Langham, Samuel Frederick Langham, John Mackie Langham, William Mansfield, and George Wagstaff, or their certain attorney, executors, administrators, or assigns, for which payment well and truly to be made by the Company, the Company, Robert Baxter and Philip Rose, thereby bound themselves, their successors, heirs, executors, and administrators, and each of them, jointly and severally, firmly by such bond.

The condition of the bond was, so far as is material, as follows:—

“ And whereas Charles Salisbury Butler and William Hurst Aspitel, two of Her Majesty’s justices of the peace for the county of Middlesex, by writing under their hands, bearing date the 18th day of July instant, at the request of the said Company did nominate and appoint George Smith, of Mercers’ Hall, in the city of London, an able practical surveyor, to determine the value of the said lands, or of the interest therein, which the said James George Langham, John Mackie Langham, Samuel Frederick Langham, William Mansfield, and George Wagstaff were entitled to, or enabled to sell and convey, and other compensation to be paid to the said James George Langham, John Mackie Langham, Samuel Frederick Langham, William Mansfield, and George Wagstaff, as aforesaid; and the said George Smith having had regard not only to the value of the said lands, but also to the damage (if any) which would be sustained by reason of severing of the said lands from other lands, or otherwise injuriously affecting such other lands by the exercise of the powers of the said act, or any of them, or any act incorpo-

pensation as aforesaid; and such surveyor shall determine the same accordingly, and shall annex to

his valuation a declaration in writing, subscribed by him, of the correctness thereof.”

rated therewith, has valued, estimated, and determined such purchase-money and compensation at the sum of £3300, and has annexed to his valuation a declaration in writing, subscribed by him, of the correctness thereof: and whereas the said Company have paid the said sum of £3300 into the Bank of England, in the name and with the privity of the Accountant-General of the Court of Chancery, to the credit of James George Langham, John Mackie Langham, Samuel Frederick Langham, William Mansfield, and George Wagstaff, subject to the control and disposition of the said Court; and the said Company have, in further pursuance of the provisions of the recited act, entered into the above-written bond or obligation, in which Robert Baxter and Philip Rose, being two sufficient sureties approved by the justices, have also entered, subject to the condition hereinafter contained, for the purpose of delivering or tendering these presents to the said James George Langham, John Mackie Langham, Samuel Frederick Langham, William Mansfield, and George Wagstaff, previously to such entry, according to the provisions of the said recited act. Now, the condition of the above-written bond or obligation is, that if the above-bounden Great Northern Railway Company, Robert Baxter, and Philip Rose, or any of them, do and shall on demand well and truly pay, or cause to be paid, to the said James George Langham, John Mackie Langham, Samuel Frederick Langham, William Mansfield, and George Wagstaff, (a) heirs, executors, administrators, or assigns, or do and shall on demand deposit in the Bank of England, under the provisions of the hereinbefore-recited act, called the 'Lands Clauses Consolidation Act, 1845,' the amount of all such purchase-money or compensation as shall in the manner provided in and by the said Lands Clauses Consolidation Act, 1845, be determined to be payable by the said Company in respect of the lands so intended to be entered upon by the said Com-

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pany, together with interest thereon, after the rate of £5 per cent. per annum, from the time of entering on such lands until such purchase or compensation-money shall be paid or deposited as aforesaid, then the above bond or obligation shall be void; but, otherwise, shall remain in full force and virtue."

There was indorsed on the bond a copy of a receipt, dated the 14th of July, and purporting to be signed on behalf of the Governor and Company of the Bank of England, by their cashier, stating that the Great Northern Railway Company had paid into the Bank the sum of £3300, which had been placed to the credit of the Accountant-General of the Court of Chancery, *ex parte* the Great Northern Railway Company, the account of James George Langham, Samuel Frederick Langham, John Mackie Langham, William Mansfield, and George Wagstaff, devisees in trust under the will of William Langham, deceased.

The plaintiffs thereupon instituted the present suit against the Company, their secretary, and the *cestuis que trustent*, under Mr. William Langham's, jun., will, and by their bill disputed the validity of the bond, on the grounds that, according to the true intent and meaning of the Lands Clauses Consolidation Act, 1845, the surveyor to be appointed by the justices for the purposes of the 85th section of such act ought to be a person not pledged by any opinion before given by him to either party of the value of the property to be valued, and that he ought to be a person quite indifferent, and without fear or favour of or to either side; and further, that the sureties in the bond ought to be persons each of them possessed of property at least of an equal amount to that of the penal sum mentioned in the bond, over and above the amount of all their debts and liabilities; and further, that the obligees in such bond ought to have each of them an opportunity of attending before the justices, and of offering before them all reasonable objections which such obligees may respectively have to the proposed surveyor, and to the proposed sureties, and of calling on the

justices to hear and determine such objections; and that, more especially as respected the sureties, the obligees ought respectively to have an opportunity of requiring the justices to approve of sufficient sureties in case the parties differed about the same; and that the plaintiffs and the Company would have differed about the persons who were sureties in the bond: that Mr. G. Smith, when he was appointed by the justices to value plaintiffs' property, was and stood pledged by an opinion which he had before given as to the value of plaintiffs' property, and that he had, in fact, previously to his appointment, been employed by the Company to furnish them with a valuation of plaintiffs' property; and that his valuation mentioned in the bond was a mere echo of the opinion which he had formerly given on the subject in consequence of such employment, and not one formed after his appointment; and that he did not, after his appointment, make any fresh or further survey or valuation of the plaintiffs' property, for the purpose of which he had been appointed: that he was not a person indifferent and without fear or favour of or to the Company; and, as evidence thereof, the bill charged that he was an officer of the Company, being the person, or one of the persons, regularly employed by them to make surveys and valuations of property required by the Company for the purposes of their railway; and that he was in the receipt and expectation of a large salary, or large sums of money, from the Company, for surveys and valuations which he was so employed to make for them; and that, in fact, he was a dependant on the Company: that, as respected the sureties, they had each of them entered into, for the Company and otherwise, a great number of bonds similar to that delivered to the plaintiffs, and also into a great number of engagements and liabilities for the Company and otherwise, and that the total of such bonds, engagements, and liabilities so entered into by them amounted to much more than the whole of the property of either of them.

The bill further charged, that an embankment such as

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was contemplated as aforesaid, and the necessary works connected therewith, would so utterly destroy and disfigure the property, and change its nature and character, as that it would prevent entirely the jury from forming any just estimate of its value, and that it was absolutely necessary, for doing justice between the parties, that the jury should have had the opportunity of viewing plaintiffs' property in its present state; and that, if the Company were permitted to take possession of the property, and to carry on their embankment and works on it before the jury should have viewed the property, although the form of assessment by a jury might be gone through, yet that in substance and truth plaintiffs would be deprived of the benefit of having the amount to be paid for the property ascertained by the jury, according to the spirit, true intent, and meaning of the Lands Clauses Consolidation Act, 1845, and the Company would get possession of plaintiffs' property at much less than its real value. The prayer was, that the defendants, the Company, and their secretary, their respective engineers, officers, agents, servants, and workmen, might be respectively restrained by injunction from entering upon or taking possession of, and from interfering with, and from continuing in possession, and from causing or procuring plaintiffs, or any or either of them, to be kept out, or removed from, or disturbed in their or either of their peaceable and quiet possession of the thereinbefore particularly mentioned messuages, lands, and hereditaments, or any of them, or any part thereof; and also from pulling down, damaging, defacing, destroying, or injuring, and from causing and procuring, or permitting or suffering to be pulled down, defaced, destroyed, or injured, any of the messuages or buildings standing on the lands and hereditaments, or any of them, or any part thereof; and also from making, or causing and procuring to be made, or to remain or continue on the lands and hereditaments, or any part thereof, any embankment, excavation, or other works, or any materials, under or by virtue

of, or under colour of the bond, dated the 14th day of July, 1847, or of any proceeding grounded thereon; and the bill prayed in the alternative an injunction to restrain the Company from committing any waste, spoil, or destruction in, over, or upon the messuages, lands, and hereditaments, or any part thereof, which would, could, or might interfere with or prevent a jury, summoned according to the provisions of the Lands Clauses Consolidation Act, 1845, from determining and settling, as contemplated by such act, the amount to be paid to plaintiffs respectively for their messuages, lands, and hereditaments, and plaintiffs' respective estates, rights, and interests therein.

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Mr. *Bacon* and Mr. *Pole* now moved, *ex parte*, on behalf of the plaintiffs, for an injunction in the terms of the prayer of the bill.

Mr. *Wigram* and Mr. *Denison* appeared on behalf of the Company, and objected that the Company had been served with a subpoena; and that, under such circumstances, it was irregular to move *ex parte*. They cited *Perry v. Weller* (a).

The VICE-CHANCELLOR held, that the motion could not be made *ex parte*.

It was then arranged that the motion should proceed; and it was heard upon the affidavit of the plaintiff, Samuel Frederick Langham, which was an echo of the bill, no evidence being adduced on behalf of the defendants in opposition to the motion.

Mr. *Bacon* and Mr. *Pole*, for the plaintiffs.—The Company proposed, at first, to call out a jury; and now they endeavour to avail themselves of a clause in the Lands Clauses Consolidation Act, to take possession before the verdict is

(a) 3 Russ. 519.

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obtained. They have, however, not complied with the provisions of the act; and if they had, still we contend that, under the circumstances, they would be held to have used its provisions inequitably. In the first place, there has been no valid approval of the sureties by the justices; because the plaintiffs have had no opportunity of attending and urging such objections as they had to make to them. [Mr. Wigram referred to *Bridges v. Wilts, Somerset, and Weymouth Railway Company* (a).] The statute provides that the justices shall approve of the sureties if the parties differ. How can they differ if only one party appears?

In the next place, the Company had notice of the state of the title, and that three of the plaintiffs were competent to contract, and the others not; and yet they give a joint bond, and pay the money to a joint account. That cannot be a proper fulfilment of the requirements of the act. Again, the amount for which the bond is given is insufficient, for a valuation by a surveyor, who had valued the land already, as the officer of the Company, being a mere repetition of his former statement, cannot be a fair compliance with the statute. Also, the form of the bond is not according to the act, the condition being not for immediate payment, but for payment on demand only.

But if the requisites of the act were literally complied with, the Court would not permit a company to avail themselves of the statutory powers inequitably. Now, in this case, the Company induced the plaintiffs to believe that they were about to summon a jury, and not to avail themselves of the summary proceeding by delivery of a bond. On the 8th of June they offered to refer the question to a special jury. On the 22nd of June the plaintiffs inquired when the Company intended to summon a jury; and they replied, they intended to do so in a few days, but could not specify the exact time. The plaintiffs relied upon this; and although they had the means of compelling the Company, by *manda-*

(a) 4 Railw. Cas. 623.

mus, to summon a jury, they suffered Trinity Term to elapse; and on July 8, they, to their surprise, received notice that the Company intended to proceed under the 85th section. And they then enter upon the land, and commence the formation of an embankment, and otherwise to change the appearance of the property, in such manner that it would be impossible for a jury to form an opinion as to its value in its original state. [The *Vice-Chancellor*.—But the act allows that to be done.] We admit that it does, if its provisions are legally and equitably pursued, but not where a company leads a landowner to believe that they are about to take one course, and then take another. [They cited *Dawson v. Pavers* (a).]

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The *Vice-Chancellor* only desired to hear the defendants' counsel upon the question as to the sufficiency of the bond. His Honor did not think that the other parts of the case afforded any judicial grounds for the interference of the Court. His Honor, however, intimated, in the course of the argument, that, but for the authority of *Bridges v. Wilts, Somerset, and Weymouth Railway Company* (b), he should probably have thought that the proceedings as to the approval of the sureties ought not to have been *ex parte*.

Mr. *Wigram* and Mr. *Denison*, for the defendants.—The only objections made to the bond are, that it is conditioned for payment on demand, and that it is given to the obligees jointly. As to the former objection, it has been decided, that the commencement of an action is a sufficient demand, within the meaning of such a condition. How, then, can it be said that the remedies or security of the plaintiffs are prejudiced by the condition being so framed? There is nothing in the Lands Clauses Consolidation Act to shew that such a bond is not a compliance with its provisions. Next, as to the bond being made to the obligees jointly, this is also a com-

(a) 5 Hare, 415.

(b) 4 Railw. Cas. 623.

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pliance with the terms of the act; and it would be a serious obstruction to the formation of railways if companies could not take possession, under the 85th section, until they had informed themselves of the exact state of the title of land-owners, for the purpose of framing the bond according to such title, because this would, in most cases, be impracticable; and if the parties do not object to the form of the bond when it is tendered, and point out how it ought to be framed, so as to be in accordance to the title, they cannot afterwards set aside the proceedings on that ground. Here, on the contrary, the parties have all along acted together as having one joint title, and have so sued in their bill; so that, if this objection to the bond be good, it would shew that the suit is improperly instituted, and that there is a misjoinder of plaintiffs having distinct interests.

The VICE-CHANCELLOR:—

These proceedings having been *ex parte*, it was incumbent upon the Company to be strictly regular and correct in their proceedings. It strikes me that this bond is not strictly correct and regular.

Supposing that the treaty, so far as there was a treaty, had not proceeded by all the tenants in common acting together, as carrying on one treaty, I should have felt much less difficulty upon this point than I do. The difficulty arises from the manner in which the parties themselves have acted together and sued.

Still, though they did act together, that did not, I apprehend, give a license to the Railway Company to deal with the purchase-money, which would have to be paid for each several share, or with the several rights of each, in an irregular manner.

But, assuming that the manner in which they conducted themselves in the treaty, acting by one solicitor, would have justified or rendered excusable, at least for the present purpose, one bond given to all jointly, it is a different question, whether the money, that has been paid into the Bank,

should have been paid in, as it has been, in one sum to the joint account of all; and a different question also, whether the condition of the bond should be in these words, "that they do and shall on demand well and truly pay or cause to be paid to the said" parties, treating them jointly, "or do and shall on demand deposit in the Bank of England, under the powers of the act, the amount of such purchase-money or compensation." It strikes me that this was irregular, and that the manner in which the owners of the land have acted together, does not preclude them wholly from taking this objection. Neither have they misrepresented their title in any way, as I understand the matter. Nor is it to be inferred that the Railway Company were ignorant of it, for in the first notice three gentlemen named Langham are mentioned alone, and then in a subsequent notice there are added the names of the devisees of another gentleman named Langham. I think that the payment into court and the bond are irregular, notwithstanding all that has taken place, and notwithstanding the form of the suit, and independently of the observation that I am about to make, founded on the words "on demand," which occur, I think, twice.

With regard to the use of those words, I would rather not give, at present, a conclusive opinion upon the point: but the present inclination of my judgment upon the subject is, that their introduction is improper, and that it may tend, as has been suggested, to create a difficulty which was not intended. I rather think that it ought to be taken as the intention of the act, that that which was directed to be done, should be done at the first moment, without any demand. I incline to that view of the case, and if it be correct, the bond is wrong also in that respect (a).

There is also a slight omission in the bond, which probably would not be noticeable but for the peculiar state of

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(a) See *Poynder v. Great Northern Railway Company*, 16 Sim. 3; *S. C.*, on appeal, 2 Phil. 330.

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the title. It is merely a slip of the pen, and it occurs in the condition. "Now the condition of the above-written bond is such, that if the above-bounden Robert Baxter and Philip Rose, or any of them, do or shall on demand well and truly pay or cause to be paid to the said J. G. Langham, J. M. Langham, S. F. Langham, William Mansfield, and George Wagstaff, heirs, executors, administrators, or assigns"—omitting the word "their" before the word "heirs." If they were clearly joint tenants, if there were no doubt or difficulty about the title, I should be disposed to treat (and I rather think there is authority for treating) the omission of that word as immaterial. I am not satisfied that, in this particular case, the omission, which is merely accidental, is immaterial. But I do not decide the case upon that point, I do not give any opinion upon the insufficiency of the bond in that particular. I doubt whether the bill is properly framed; that is, whether, inasmuch as the plaintiffs claim as tenants in common, there is not a misjoinder. However, I do not apprehend that at this stage of the case, there not being any plea or demurrer, the Court is bound to take notice of those objections.

I wish now to be informed whether the Company, having understood the way in which I view this case, are disposed to make any offer, in order to prevent the necessity for granting an injunction.

After some discussion, the counsel for the defendants entered into the following undertaking:—"The Company undertake not to interfere further with the property until Tuesday, and, if the warrant is not lodged with the sheriff by Tuesday, not to interfere further with the property till it is lodged; and also undertake to prosecute the warrant with due diligence." Upon this undertaking being given, the Vice-Chancellor forbore to make any order upon the motion.

On this day a motion was made on behalf of the plaintiffs, that the costs of the plaintiffs in the suit, and their costs in the present application, might be taxed, and that the Company and their secretary, or one of them, might be ordered to pay to the plaintiffs the amount of such costs when so taxed, and that thereupon all further proceedings in the suit might be stayed. In support of the motion affidavits were filed, stating to the following effect:—

That on the 14th of August, 1847, the special jury assessed the value of the property in question at £5000. That the plaintiffs had since made out and deduced a good title, which had been accepted by the Company, who had paid the sum of £5000 as the purchase-money for the same. That the object the plaintiffs had in filing their bill in this suit having been attained by the motion for an injunction and the undertaking of the Company, Mr. S. F. Langham, on the 17th of August, 1847, sent to the solicitors to the Company a letter informing them that it was not the wish of the plaintiffs to call for an answer to the bill, or continue the proceedings for the mere purpose of having the question of costs of the suit disposed of, and inquiring whether the Company would consent to pay the plaintiffs' costs on the bill being dismissed. That the Company had not acceded to this request; and that no further proceedings in the suit had been taken; and that no costs whatever had been incurred therein since the motion for an injunction was made, and such undertaking was given by the Company.

Mr. *Bacon* and Mr. *Pole*, in support of the motion.—All the objects of this suit have been answered. The only question left undisposed of in the cause is as to the costs of the suit. The plaintiffs' proper course is to make the present application. When a defendant submits to the whole demand of a plaintiff to pay the costs, he has a right at once to stop all further proceedings, *Sivell v. Abraham* (a); and

(a) 8 Beav. 598, and see the cases there collected, and *Price v. Corporation of Penzance*, 4 Hare, 510.

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Where, in an injunction suit, the plaintiffs moved before answer that the bill might be dismissed, and that the defendants might pay the costs of the suit, on the ground that the suit was occasioned by their wrongful act, and that all the purposes of it had been attained by the motion for an injunction, the Court, although considering such an application reasonable, declined to introduce a new practice by making the order.

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there appears to be no substantial difference whether the motion be by the plaintiff or the defendant. Indeed, in *Sivell v. Abraham*, the Master of the Rolls so intimated, saying, "Where everything had been submitted, the plaintiff ought not to have gone on incurring expenses—he ought to have applied to the Court as to costs;" and that was the ground on which his Lordship refused to allow the plaintiff his costs at the hearing of that case. If the plaintiffs in the present case, therefore, had not made the present application, it would, at the hearing, have been relied upon as a ground of depriving them of their costs.

Following the principle of the decision of the Master of the Rolls, in *Sivell v. Abraham*, the Vice-Chancellor of England recently, in a case where the plaintiff had obtained all the relief he sought by his bill, gave the plaintiff his costs upon motion in the way now asked: *Winter v. Vizitelli*, 7th April, 1848 (a).

The *Vice-Chancellor* remarked, that in the former of the two cases cited there was a contingent expression of opinion merely, and that in the latter there appeared to have been an actual agreement to do the act required by the bill, and a promissory note given in respect of matters consequent.

His Honor said, it appeared fairly arguable that there was no substantial distinction between staying the suit at the instance of the plaintiff and staying it on the application of the defendant, which had been done (b). But he would prefer not to introduce a new practice without authority.

The plaintiffs' counsel submitted that the cases cited were authorities in favour of the motion.

The *Vice-Chancellor* said, that, assuming the plaintiffs' statement to be correct, there seemed justice and reason in

(a) Legal Observer, vol. 36, p. 53.

(b) See *Damer v. Lord Portarlington*, 2 Phil. 30.

the application; but the question was, whether a defendant was not entitled to say that he would file an answer in order that it may be evidence on the question of costs.

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At the conclusion of the argument for the plaintiffs—

The VICE-CHANCELLOR said, “ Since this discussion commenced I have inquired of a learned judge what is the course taken at Chambers in this case—action brought: the defendant pays the debt in full—nothing being said about costs. Will a judge at Chambers, upon the plaintiff’s application, stay the action, giving the plaintiff his costs? The learned judge considers that, as between the parties themselves, it probably would not be done, though, if it were made out that the arrangement was made by the parties to defraud the plaintiff’s attorney of his costs, then very possibly the judge would give the costs to the attorney. Of course that is only the view that the learned judge has taken of it at the moment. Supposing the plaintiffs’ statement of the case to be correct, I am still of opinion that sense and reason are in favour of the application, but I do not feel myself authorised to make the order.”

A discussion then took place as to costs, in which *Malins v. Price* (a) was referred to; and ultimately the motion was refused without prejudice to any question, and the costs were reserved.

(a) 2 Coll. C. C. 190.

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A settlement of a trust fund, whereby no legal estate was affected, reformed by a declaration in the decree, without a reference, or the execution of any fresh instrument, and the form of such order.

BY articles of agreement, dated the 30th of December, 1840, and executed immediately before the marriage of Mr. Alfred Thwaytes Tebbitt and Miss Sophia Margareta Robins, after reciting that Miss Robins was entitled, after the decease of her father and mother, to certain shares in certain trust funds, and that it had been agreed, that all the shares of the said Sophia Margareta Robins should be settled as thereafter mentioned, and that, there not being time to prepare a proper settlement, that agreement was intended, for the present, to supply the place thereof, Mr. Tebbitt agreed with Mr. John Radcliffe Robins, with the consent of Miss Robins, to assign all Miss Robins's shares and interest in certain trust funds therein referred to, and any other sums of money which might thereafter be bequeathed to her, unto Mr. John Radcliffe Robins, his executors, administrators, and assigns, on trusts thus expressed: "Upon trust, as soon as any such share or interest, or any other sum or sums of money, shall be receivable or come into possession, to place the same in some or one of the Government funds, with liberty to vary such funds as occasion or convenience may require; and, after the decease of the said Sophia Margareta Robins, to apply the dividends and interest to the maintenance, education, and support of any child or children of the said Sophia Margareta Robins, during her or their minority, but not so as to prevent any such child or children who may have attained the age of twenty-one from receiving his, her, or their share of the capital on the decease of the said Sophia Margareta Robins, which it is intended they are to take share and share alike; and in case of the death of the said John Radcliffe Robins, or any new trustee to be hereafter appointed, for her, by any writing, to nominate any new trustee, in the room or stead of the said John Radcliffe

Robins so dying, or any other trustee dying, becoming incapable to act, leaving the country, or wishing to be discharged."

After the marriage, an indenture of settlement, dated the 3rd of September, 1841, and purporting to be made between Mr. and Mrs. Tebbitt of the one part, and Mr. John Radcliffe Robins, Mr. Edmund Robins, and Mr. Jos. Aldridge, of the other part, was executed by all the parties thereto except Mr. John Radcliffe Robins. By this settlement, which recited the agreement of the 30th of December, 1840, and the desire of Mr. and Mrs. Tebbitt that the shares and personal estate of Mrs. Tebbitt should be settled upon the trusts thereafter mentioned, and that Mrs. Tebbitt had named Edmund Robins and Jos. Aldridge to be added as trustees, Mr. Tebbitt covenanted to assign the shares and personal estate of Mrs. Tebbitt, or of Mr. Tebbitt in her right, unto Messrs. J. R. Robins, Edmund Robins, and Jos. Aldridge, upon trusts for conversion of the trust funds, and then as follows: "Upon trust, that they, the same trustees or trustee for the time being, do and shall lay out or invest the same, in their or his names or name, in the purchase of a competent share or competent shares of any of the parliamentary stocks or public funds of Great Britain, or at interest upon Government or real securities in England, but not in Ireland; and do and shall, from time to time, alter, vary, and transpose the same stocks, funds, and securities, at their or his discretion; yet so as that every such laying out or investment, alteration, variation, or transposition, shall, during the life of the said Sophia M. Tebbitt, be made with her consent in writing;" with trusts for payment of the income to Mrs. Tebbitt for her life. The trusts to take effect after her decease were thus expressed: "Do and shall, from and after the decease of the said Sophia M. Tebbitt, stand and be possessed of, and interested in, all and singular the said trust monies, stocks, funds, and securities, and the interest, dividends, and annual

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produce thereof, in trust for all and every the children and child of the said Sophia Margarett Tebbitt by the said Alfred T. Tebbitt, or any husband or husbands with whom she may intermarry after his decease, who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, to be divided between or among such children, if more than one, in equal shares; and if there shall be but one such child, the whole to be in trust for that one child."

The deed next contained a provision in the common form for advancement of half of any child's share, followed by a clause for maintenance of children in the following words: "And it is hereby agreed and declared, that the same trustees or trustee for the time being shall, after the decease of the said Sophia M. Tebbitt, at their or his discretion, pay or apply the whole, or such part as the same trustees or trustee for the time being shall from time to time think fit, of the interest, dividends, and annual produce of the portion, or respective portions, to which any child or children of the said Sophia M. Tebbitt shall or may, for the time being, be entitled in expectancy under the trusts hereinbefore declared or expressed, for or towards the maintenance and education of such child or children respectively in the meantime, and until such his, her, or their portion, or respective portions, shall become vested or payable, whether the father of such child or children respectively, if living, shall or shall not be of ability to maintain and educate him, her, or them respectively."

The indenture contained a power to Mrs. Tebbitt, her executors, administrators, or assigns, by any writing, to appoint a trustee or trustees in the room of the then present or any future trustees, in the event of any such trustees being absent from the United Kingdom for more than nine months or desiring to be discharged, and in other specified events. The indenture contained other usual clauses.

By an indenture, dated the 25th of April, 1846, and

made between Mr. J. R. Robins of the first part, Mr. and Mrs. Tebbitt of the second part, and Mr. E. Robins and Mr. Jos. Aldridge of the third part: which recited, that no property had up to that time vested in the trustees; that Mr. J. R. Robins had not acted as a trustee under the agreement and indenture; and that, moreover, he had been absent from the United Kingdom for more than nine months. Mr. J. R. Robins renounced the property forming the subject of the agreement and indenture of settlement, and the trusts thereof, and renounced and quitted claim to the same property.

There were four children only of the marriage, who, being infants, filed the bill by their next friend against Mr. and Mrs. Tebbitt, Mr. E. Robins, and Jos. Aldridge, the two continuing trustees, Mr. J. R. Robins, and certain parties in whom the trust-funds were vested.

The bill stated the above-mentioned facts, and charged that suggestions had been made that the trusts of the indenture of settlement were in many respects not in conformity with the provisions of the antenuptial agreement, and that it was doubtful who were the trustees of the settlement. The prayer was, that it might be declared that the indenture of settlement of the 3rd of September, 1841, was in conformity with the provisions of the said agreement of the 30th day of December, 1840, and that the trusts of the said indenture might be declared to be performed, or else that the said indenture of settlement might be rectified in such manner as to be in conformity with the provisions of the said agreement; and that it might be declared who was or were the trustee or trustees of the trust-funds.

Mr. *Bird*, for the plaintiffs.—As no legal estates were affected, the Court may at once rectify the settlement by its decree, without directing any reference to the Master, or putting the estate to the costs of any deed for the

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purpose. It has been done in other branches of the Court in cases of this kind.

In the same way the Court can declare who are or ought to be the trustees, and what shall be done as to the appointment of trustees.

Mr. *Willcock*, for all the defendants, did not object to the proposed reformation of the settlement, and stated, that Mr. J. R. Robins wished to retire from the trusts.

It was admitted by the counsel for the plaintiffs and defendants respectively, that all parties interested in the trust-funds were before the Court.

The VICE-CHANCELLOR directed the settlement to be reformed according to the agreement, and thought it should be done by the decree of the Court. His Honor directed that the appointment of Messrs. E. Robins and Jos. Aldridge to be trustees, should be confirmed; and, Mr. J. R. Robins desiring to be discharged from acting as a trustee, that Mrs. Tebbitt should appoint some proper person to be trustee in his place.

The following is the substance of the decree with reference to the principal questions in this case:—

It being admitted by the counsel for the plaintiffs and defendants that all the parties interested in [*the trust-funds*] are parties to this suit, this Court doth confirm the appointment of the defendants, Edmund Robins and Joseph Aldridge, as trustees of the indenture of settlement of the 3rd day of September, 1841; and the defendant, John Radcliffe Robins, desiring to be discharged from acting as trustee under the said indenture of settlement, this Court doth order and decree, that the defendant, Sophia Margareta Tebbitt, in exercise of the power for that purpose given to her by the said indenture of settlement, (altered and

rectified as hereinafter directed), do appoint some proper person to be a trustee of the said indenture, in the place of the said John Radcliffe Robins, to act jointly with the defendants, Edmund Robins and Joseph Aldridge, as trustees of the said indenture. And this Court doth declare, that the defendant Sophia Margareta Tebbitt's one-seventh share of [*the trust funds*] is subject to the trusts of the said indenture of settlement.

And this Court doth declare, that the said indenture of settlement is not in all respects in conformity with the provisions of the articles of the 30th day of December, 1840, and that the said indenture ought to be and do stand altered and rectified in manner hereinafter directed. And this Court doth declare, that the trusts in the said indenture expressed for the investment of [*the trust funds*] in any of the Parliamentary stocks or public funds of Great Britain, or at interest upon Government or real securities in England, but not in Ireland, and for the alteration, variation, and transposition of the same, ought to be and do stand altered and rectified, so as to authorise the investment of the said [*trust funds*] in any of the Parliamentary stocks or public funds of Great Britain, or upon Government securities in England only, and so as to authorise the alteration, variation, and transposition of the same for or into other stocks, funds, or securities of the like nature only.

And this Court doth declare, that the trusts in the said indenture of settlement expressed concerning [*the trust funds*] for all and every the children and child of the defendant Sophia Margareta Tebbitt by the defendant Alfred Thwaytes Tebbitt, or any husband or husbands with whom she may intermarry after his decease, who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, to be divided between or among such children, if more than one, in equal shares, and if there shall be but one such child, in trust for that child, ought to be a trust for all and every the children and child of the defendant, Sophia Margareta Tebbitt by the said Alfred Thwaytes Tebbitt, or any husband or husbands with whom she may intermarry after his decease, who shall attain the age of twenty-one years, or marry under that age, to be divided between or among such children, if more than one, in equal shares, and if there shall be but one such child, in trust for that child; And this Court doth declare, that the said indenture of settle-

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ment ought to be and do stand altered and rectified accordingly.

And this Court doth declare, that the words, 'whether the father of such child or children respectively, if living, shall or shall not be of ability to maintain and educate him, her, or them,' which are contained in the power in the said indenture of settlement expressed for the maintenance and education of the child and children respectively of the defendant, Sophia Margareta Tebbitt, in the meantime and until his, her, or their portion or respective portions shall become vested or payable, ought to be struck out and erased from the said indenture.

And this Court doth declare, that the power in the said indenture of settlement contained, authorising the defendant Sophia Margareta Tebbitt, her executors or administrators, by any writing or writings under her or their hand or hands, to appoint a new trustee or new trustees in the room of a trustee or trustees being absent, or desiring or becoming incapable to act, as in the said indenture mentioned, ought to be and do stand varied and rectified in such manner as to authorise the defendant, Sophia Margareta Tebbitt, during her life, and after her decease to authorise the surviving or continuing trustees or trustee, or the executors or administrators of the last surviving or continuing trustee, with the consent of the adult person or persons (if any) for the time being entitled or interested under the indenture of settlement, and with the consent of the guardian or guardians of the person or persons (if any) so entitled or interested, who shall be under the age of twenty-one years, by any deed or deeds, to be by the defendant, Sophia Margareta Tebbitt, or such surviving or continuing trustees or trustee, or the executors or administrators of such last surviving or continuing trustee, respectively signed, sealed, and delivered, in the presence of and attested by two witnesses, to appoint such new trustee or trustees as aforesaid.

And this Court doth declare, that the trusts of the said indenture of settlement, varied and rectified as aforesaid, ought to be carried into execution in like manner as if the same had been so varied and rectified, before the execution of the said indenture by any of the parties thereto.

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BURNHAM v. BENNETT.

August 3rd.

THIS case is reported upon a former hearing in 2 Coll. 254. The question remaining to be determined was, whether Mrs. Susannah Stephens had exercised a power given to her by a deed dated the 17th of March, 1813, whereby trustees were directed to hold trust funds, upon trust, to pay, assign, and transfer, all the trust stock, money, and premises, and the respective funds and securities whereon or in which the same should be then placed or invested, unto and amongst all and every such one or more of the child or children of William Stephens by Susannah his wife, in such parts, shares, and proportions, at such times, in such manner and form, and subject to such conditions, restrictions, and limitations, as the said Susannah Stephens should, at any time or times, notwithstanding her coverture, by any deed or writing, with or without power of revocation, or by her last will and testament in writing, or by any writing purporting to be, or in the nature of, a will, to be by her duly signed, sealed, and delivered, in the presence of and to be attested by two or more credible witnesses, give, direct, limit, or appoint the same; and in default of such gift, direction, limitation, or appointment, and also in case of any incomplete one, upon further trust, to pay, assign, and transfer the said trust stock, monies, and premises, or so much and such parts or part thereof, concerning which there should be either no such disposition or no total or entire disposition, and the respective funds or securities whereon or in which the same should

By a settlement of 1813, stock was settled, upon trust, in the events which happened, for such persons as a married woman should, during and notwithstanding coverture, (among other modes), by her last will and testament, in writing, or any writing purporting to be or in the nature of a will, to be by her duly signed, sealed, and delivered, in the presence of and to be attested by two or more credible witnesses, give, direct, limit, and appoint.

The husband of the donee died in 1819, and the donee in 1840. After the death of the donee of the power, a writing was found in the form of a letter, and sealed on the outside only, purporting to bear

date August 20th, 1816, and to be made in execution of the power, and concluding thus, "As witness my hand and seal," with a signature purporting to be that of the donee, and two other names in other hands-writing, but with no memorandum of attestation. On a reference to the Master, in 1847, as to the form and manner of the execution of this paper, no evidence could be produced but such as was afforded by the document:—*Held*, that the document was not shewn to be a due execution of the power.

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be then placed or invested, unto and amongst all and every the child and children, whether sons or daughters, of the said William Stephens by the said Susannah his wife, in manner therein mentioned. But in case there should be no such child or children of the said William Stephens by Susannah his wife, or, being such, they should all die without attaining the age of twenty-one years and without leaving lawful issue, then upon trust to pay, assign, and transfer the said stock, monies, and premises, or the respective funds and securities whereon or in which the same should be placed or invested, unto or amongst such person or persons, and in such parts, shares, and proportions, at such times, and in such manner and form, and subject to such conditions, restrictions, and limitations, as the said Susannah, the wife of the said William Stephens, at any time or times, during and notwithstanding her coverture, by any deed or deeds, writing or writings, with or without power of revocation, or by her last will and testament in writing, or any writing purporting to be, or in the nature of, a will, to be by her duly executed in manner aforesaid, should give, direct, limit, or appoint.

The bill was filed by the surviving trustee of the deed, and the question remaining to be decided arose between two sets of defendants, one claiming under, and the other in opposition to, the dispositions contained in a paper writing purporting to be an execution of the power, by way of a testamentary appointment, by Susannah Stephens. It was written on three sides of a sheet of letter-paper, which was folded up, and sealed outside only, and indorsed, "The Will of S. Stephens."

It began as follows:—

"On this day, August 20th, 1816. This is to certify, that I, Susannah Stephens, now wife of William Stephens, of the parish of Courtenhill, in the county of Northampton, being of sound mind, and authorised and empowered by

deed to give and bequeath my property as follows: I give and bequeath," &c.

[Then followed various bequests, and the document concluded thus:]

"This is my last will and pleasure, to the exclusion of every other. As witness my hand and seal, this date before mentioned.

SUSANNAH STEPHENS.

MORRIS WARD.

J. WARD."

The whole appeared to be in one handwriting, except the names "Morris Ward, J. Ward." The defendants, who disputed the validity of the appointment, alleged by their answer, that this paper was a fabrication, and was in fact not written before 1826; and, as evidence of this, the defendants alleged, on information and belief, that in 1825 a case had been laid before Sir Samuel Romilly, as to whether a valid appointment could then be made by Mrs. Stephens, her husband being then dead, and that the opinion was in the negative. The answer also alleged other circumstances impeaching the genuineness of the document, but no evidence was gone into by any of the parties to the cause.

By the decree it was referred to the Master to inquire whether the instrument was made during the coverture of Susannah Stephens, and at what time her signature was written, and at what time or times, and for what purpose, the names of Morris Ward and J. Ward at the foot of the instrument were written, and in what manner and form, and with what ceremonies (if any) the said Susannah Stephens executed the said instrument, and in whose presence, and under what circumstances, the three signatures were made.

The Master, by his report of June 30, 1847, found that a will of the said Susannah Stephens had been produced to him, which was written on three sides of a sheet of letter-paper, and signed by her; and that the document itself,

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and the signature thereto, appeared to be in one and the same handwriting. That there was not any written form of attestation thereto, but that the names "Morris Ward" and "J. Ward" were written at the foot thereof, as witnesses. And he found that the plaintiff had contended, before him, that this instrument, which was dated the 20th day of August, 1816, was not upon the face of it a good and valid execution of the power of appointment given to Susannah Stephens by the settlement; inasmuch as by the said settlement it was required that the instrument to be made in exercise of such power, should be sealed by her. And he found, from the affidavit of a defendant, named Robert Stone, before referred to, that the said instrument, dated the 20th day of August, 1816, with a codicil thereto annexed, was delivered by the said Susannah Stephens to him, the said defendant, Robert Stone, on the 23rd day of February, 1840, which is the day upon which the said codicil is dated; and that the said defendant, Robert Stone, delivered the said instrument, together with the said codicil, to Mr. George P. Hester, the solicitor of the said Susannah Stephens, by whom the said codicil was prepared; and that the said instrument and codicil remained in the possession of the said George P. Hester until the decease of the said Susannah Stephens. And that the said defendant, Robert Stone, and Susan his wife, stated they had made diligent inquiries for the purpose of discovering where the said Morris Ward and J. Ward, the attesting witnesses to the said will, resided, and whether they were alive or dead; and they had been informed, and believed, that the said Morris Ward was dead; and that all the inquiries which the defendants had caused to be made after the person intended to be designated by the name of J. Ward had proved unsuccessful, though the defendants had discovered two persons of the name of Ward, the initial letters of whose names are "J," but each of whom denied that he was the attesting witness to the will of the said Susannah

Stephens; and that, in consequence of the great lapse of time which had taken place since the execution of the said will of the said Susannah Stephens, and there being no address annexed to the names of the witnesses attesting the same, and the said defendants being personally unacquainted with such witnesses, and the defendants, John Ward, John Galliers, James Galliers, and Sarah Galliers, refusing to give the defendants any information on the subject, they, the said defendants, were unable to adduce any evidence in support of the said instrument; and neither of the persons whose names were attached to the said instrument as witnesses being produced before the said Master, and the witnesses who had been examined *vivâ voce* before him denying any knowledge of the said instrument, or having seen it previously to its being exhibited to them in his presence, or when produced in Court on the hearing of this cause, and alleging themselves to be unacquainted with the fact of the said Susannah Stephens having made any will, otherwise than by hearsay, or having any knowledge of the time of her making any will, if made, the said Master was unable to state further than appeared upon the face of the instrument itself, whether the same was made during the coverture of the said Susannah Stephens; but such instrument bearing date the 20th day of August, 1816, and the said William Stephens dying, as the said Master had before stated, in the year 1819, it would appear to him that the same was made during the coverture of the said Susannah Stephens, and that the signature of the said Susannah Stephens was written at the time the said instrument purports to bear date. But at what time or times the names, Morris Ward and J. Ward, or either of them, at the foot of the said instrument, were or was written, or by whom such names were respectively written, the Master was not able, by any evidence laid before him, to state; but if such names were written by the persons themselves, there was no doubt but that the same were written as wit-

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nesses to the signing of the said instrument by the said Susannah Stephens. And the Master was unable to state, from any evidence before him, in what manner and form, if at all, and with what ceremony or ceremonies, if any, the said Susannah Stephens executed the said instrument, or in whose presence, and under what circumstances, the signatures were made, otherwise than appeared upon the face of the said instrument itself.

Mr. *Wigram*, Mr. *Teed*, Mr. *Chandless*, Mr. *Schomberg*, and Mr. *Fooks*, appeared for the different parties. *Stanhope v. Keir* (a), *Waterman v. Smith* (b), *Burdett v. Spilsbury* (c), and *Buller v. Burt* (d), were cited.

The VICE-CHANCELLOR said, that the burthen of proof was upon those who maintained the validity of the appointment. His Honor was of opinion that the evidence was insufficient.

(a) 2 S. & S. 37.

(b) 9 Sim. 629.

(c) 10 C. & F. 340; and see

Sugden on Powers, Vol. 1, p. 316.

(d) Cited in 4 Ad. & E. 15.

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ATTORNEY-GENERAL v. CORPORATION OF BOSTON.

THE question in this case arose upon the construction of a charter of the 1 & 2 of Philip & Mary, of which the material parts were the following:—

*July 24th &
26th, &
Aug. 3rd.*

By a charter of Phil. & Mary, in Latin, of Jan. 6, 1553, after reciting, that 18 presbyters, 15 clerks, and 12 poor men had been lately maintained at Boston, out of the issues of certain guilds since dissolved, and whereof the possession had been seized by the Crown, to the grief of all the Catholic inhabitants there: It was witnessed, that, considering a provision for divine worship, and the maintenance of the poor, and the education of youth, belonged to the regal office, and at the humble petition of the mayor and burgesses, and in consideration of the charges which they sustained in and about the reparation of the bridge and port, and that

“Phillipus et Maria, Dei gratia Rex et Regina Anglie, &c., Omnibus ad quos presentes littere pervenerint, salutem. Cum Burgus noster de Boston in comitatu nostro Lincoln sit burgus antiquus; et cum nuper de exitibus et reversionibus terrarum, tenentorum, possessionum et hereditamentorum, quorundam gildarum et fraternitatum infra eundem burgum, erecti et fundati, octodecem presbyteri, quindecim clerici et duodecem pauperes, ad Dei gloriam et honorem sustentati et manutentati fuerunt infra eundem Burgum. Et cum virtute et pretexto cujusdam actus de diversis cantariis, collegiis, gildis, fraternitatibus, liberis capellis et aliis dissolvendi et determinandi, in parlamento precharissimi fratris nostri, Edwardi sexti nuper Regis Anglie, anno regni sui primo, inter alia editi et provisum dicti terre, tenementa, possessiones, et hereditamenta ad manus dicti fratris nostri deveniebant, pretexto cujus, divinus cultus ac relevamen et suppetia pauperum inhabitancium ejusdem Burgi, in summam dolorem omnium populi et catholicorum inhabitancium ibidem, valde adempta et extincta fuerunt: Nos vero premissa in animo nostro revolventes, ac nobiscum paulo altius considerantes reformationem eorundem enormem ad nostram regalem manus et functionem pertinere, ac divinum cultum, et sustentationem pauperum, ac educationem Juvenum et puerorum

they might be better able to sustain these charges, the King and Queen granted certain lands to the corporation, to the intent that they should find and maintain a grammar-school in Boston, and a schoolmaster, two priests to celebrate divine service in the parish church, and four poor persons to pray for the souls of the King and Queen, and their ancestors, with a direction to apply all the rents and profits “ad sustentationem pedagogi et suppedagogi scole predictae ac cappellanos et pauperes predictos et alia necessaria predicti burgum scholam capillanos et pauperes predicti et sustentationem et manutentionem eorundem tantummodo tangentia et concernentia.”

Held, that the trusts were for religious purposes, education, and the relief of the poor exclusively.

Effect of usage in the construction of charters.

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hujus regni nostri in probis litteris erudiend acque educand providere, in consideraçõe premissos, ac ad humilem petiçõem fidelium et dilcos subditos nros majoris et burgensium dci burgi de Boston, ac in consideraçõe grandium onerum et expens que dicti major et burgenses indies et continue sustinent in et circa reparaçõem pontis et portus nostrum ibidem, et ut iidem major et burgenses reparações et sustentações eorundem pontis et portus melius supportare possint et valeant, de gracia nostra speciali, ac ex certa sciencia, et mero motu nostris, dedimus et concessimus, ac per presentes, pro nobis, heredibus, et successoribus nostris, damus et concedimus, quantum in nobis est, pifat' majori et burgensibus burgi nostri de Boston.

Then follows a description of the parcels :—

“ Habendum, tenendum, et gaudendum predca messuagia, cotagia, gardina, trās, tenā, prata, pascuas, pastur, boscos, subboscos, reddit, reverções, et servicia, ac cetera omia et singula premissa superius expres, et specifica, et reverc^o et reverc eazdem, cum eoz pertis universis, prefatis Majori et Burgensi dci Burgi nri de Boston, et success, suis imperpetuū, ad intençõem inveniend, manutenend, et stabiliend imperpetuū unam liberam Scolam Gramaticalem in Boston predca, ac unū Magrū sive Pedagogum idoneū ad docend, erudiend, et sviend in eadem scola, pro educaçõe et instruccõe pueroz et juvenū in Gramatica; nec non ad inveniend duos Presbiteros p divina svicii celebraçõe in ecclia parochial de Boston predict; Et quatuor Pauperes inhabitantes Burgi predicti, ad orandum pro bono statu nrm dum vixerimus, ac pro aīabus nrm cum ab hac luce migraverimus, et pro aīabus progenitoz nroz ibidem imperpetuū. Tenendum de nobis ac hered et success, nostr predictē dñe Regine, ut de manerio nro de Castoem, dco Coīn nro Lincoln, per fidelitatem tantum, in libero socagio et non in capite, pro omibz redditibz, sviciis, exaccionibz, et de mandis quibuscumq. Et ulterius Damus, et per presentes,

concedimus, prefat^o majori et Burgens^{is} dñi Burgi de Boston, om̃ia exitus, redditus, revercōes, et proficua omniū et singuloꝝ premissoz cum pertiñ, a tempore attincture dñi Willi nuper Marchionis North^l hucusq, provenieñ, sive cresceñ, hēnd eisdem majori et Burgensibz ex dono nro, absq, compoto seu aliquo alio pro inde quoquomodo reddend, solvend, vel faciend. Et volum⁹ et ordinamus quod Major et Burgenses predñi et successores sui om̃ia exitus, reddit, et proficua de tempore in tempus provenien de messuagiis, cotagiis, terris, tenñs, et possessionibus predict^{is} superius per presentes concess, exponant, expendent, et convertant ad sustentacōem pedagogi et suppedagogi Scolę predñe, ac Cappellanoꝝ et paupeꝝ predict^{is}, ac alia necessaria predict^{is} Burgum Scholam, Cappellanos, et pauperes predict, et sustentacōem et manutencōem eoꝝdem, tantūmodo tangeñ et concerneñ, et non aliter, nec ad aliquos alios usus seu intencōes."

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The circumstances of the case and the substance of the arguments sufficiently appear from the judgment.

Mr. *Swanston* and Mr. *Metcalf* supported the information.

Mr. *Bacon* and Mr. *Hobhouse* appeared for the schoolmaster.

Mr. *Wigram* and Mr. *Cole* appeared for the trustees.

Mr. *Malins*, Mr. *Elderton*, Mr. *Spurrier*, and Mr. *J. D. Chambers*, appeared for the other defendants.

The VICE-CHANCELLOR :

I have felt little or no difficulty with regard to the course to be taken by the Court at the present stage of this cause, except as to the question of the interpretation of the

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charter of Philip & Mary, which was argued on the 24th and 26th of July last, and seemed then, as it still seems to me, one of some nicety. Of this I have now to dispose, the contention being, whether the annual rents of the estates held by the corporation or the borough trustees of Boston, under the charter, exceeding now twenty-fold at least, I believe, the annual rents of them at the date of the charter, and amounting to considerably more than sufficient to supply proper stipends for a master and undermaster of the grammar school, proper incomes for the two presbyters or chaplains, and a proper maintenance for four poor men, the surplus is wholly or in part applicable directly to the support of the port and bridge of Boston, or to municipal purposes, being purposes neither of charity, (in the restricted sense in which that word is popularly used,) nor of education, nor of religion. The corporation maintain the affirmative of this proposition; some, if not all of the other parties to the record, the negative; and I suppose that the corporation would be very clearly in the wrong upon the point, but for the expression "Burgum" being found where it is, towards the close of the charter, immediately before the words "Scholam Cappellanos et pauperes." That expression, however, being there, the corporation rely upon it, though not solely, for they rely also on the mention of the bridge and port, twice made in an earlier part of the instrument, and especially on the words "et ut iidem major et burgenses reparationes et sustentationes eorundem pontis et portus melius supportare possint et valeant," and moreover on usage; for they say that all usage, ever since the charter, has been in favour of their interpretation of it. Their opponents, on the other hand, claiming the whole of the rents for the poor, for education, and for religious purposes, say that such usage as there has been at all, has (rightly considered) been against the present views of the corporation, but that, independently of usage, the language of the charter is, without obscurity or ambiguity, contrary to those views. And it is

particularly contended, by those who support the information, that the charges of repairing the bridge and port are mentioned, where they are mentioned in the first instance, only as forming grounds for the gracious and favourable consideration of the Crown towards the corporation or borough, (in which point of view it may perhaps be not quite unworthy of remark, that the charter has the word "nostrum" after "pontis et portus" where they first occur). For the information, it is also alleged to be a reasonable supposition, that at the date of the charter the corporation and chief townspeople were subjected, or likely to be subjected, voluntarily or otherwise, to expenses for purposes of religion and education, from which (as it is argued) they had, before the time of Edward 6th, been free, and from which (as it is also argued) the grant relieved, or would relieve them; and so, upon any mode of reading the charter, would, by restoration or otherwise, increase, if not directly yet indirectly, their means of meeting the expenses of maintaining the bridge and port; and especially it appearing that all the estates granted by the charter were, as the charter itself shows, estates theretofore belonging respectively to the then late guilds or fraternities particularly mentioned in the charter. The opponents of the corporation rely much on the reference contained in it to the eighteen "Presbyteri," the fifteen "Clerici," and the twelve "Pauperes," that had been supported from the revenues of lands of certain guilds and fraternities founded in Boston "ad Dei gloriam et honorem," and to the dissolution of guilds and fraternities under Edward 6th, "virtute et pretextu" of which (says the charter) those lands had come to his hands: "Pretextu cujus" (the charter goes on to say): [His Honor read the commencement of the charter.] The opponents of the corporation rely, moreover, on this passage immediately following the habendum: [His Honor read it.] And it is insisted, against the corporation, that the passage just read, mentioning purposes of charity (in the sense

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before stated) and of education and religion alone, and the later passage, which directs the application of the rents, speaking particularly of the master, the undermaster, the chaplains, and the poor, it is unreasonable to read "*alia necessaria*" in that passage, as having relation to any other object than the school, the chaplains, and the poor, notwithstanding the occurrence of "*Burgum*" before "*Scholam*." It may be thought, perhaps (I may add), that the later words "*sustentationem et manutentionem*," standing where they do, are less favourable to the view of the corporation than to the adverse view—are scarcely with probability applicable to the "*borough*" generally, or at large—however well they might be applied to the port and bridge; but neither the port nor the bridge is here mentioned. The "*tantummodo*," too, and the "*et non aliter nec ad aliquos alios usus*," may be perhaps thought unlikely expressions to accompany or follow a provision embracing all necessary things touching and concerning the borough. I may notice also, (though, perhaps, after what I have said, it is superfluous), that the argument for the information charged the present theory of the corporation with improbability, and something more, in attributing (as by those who oppose the corporation it is said to do) a purpose or object to the grantors which the charter, it is said, shews by its recital or preamble, and the commencement of its operative part, to have been necessarily, in the view of the grantors, sacrilegious, or as bad—the objects, for which the guilds or fraternities that had the property held it, being considered. And with regard to this part of the argument I may state, that (whether under the words "*probis literis*" or otherwise) education such as that for which the charter intended to provide at least some means, may probably with reason be thought a matter of public benefit more germane to some part at least of the purposes of the dissolved guilds or fraternities, than the general municipal objects for which the corporation contend.

Their opponents seemed to rely (I may likewise observe)

on the yearly value of the granted property, stated in the charter to be £60, as shewing, it was contended, that the annual rents could not then have been more than sufficient for the proper maintenance of the grammar-school meant to be founded, the four chaplains, and the four poor.

With regard to the argument from usage, on either side, I omit it for the present, but shall consider that anon. Setting it aside for the moment, the conflict of the other arguments is not, I think, an excessively unequal one, if "burgum" (the "burgum" on which the corporation so mainly rely) ought to be read as on each side of the controversy I collected it to be read, namely, as a word in the accusative case singular. I doubt whether it ought to be so read, and whether it is not, in truth, an abbreviation of "burgensium." The omission of a mark over it indicative of abbreviation is not decisive against this reading, I think, looking especially at some other parts of the parchment. If the charter was intended to say what in English would be "borough school," it was better and I suppose more probable Latin surely, even of such Latinity, to express that by "burgensium scholam," (the burgesses' school), than by a barbarism so violent as "burgum scholam," considered as a compound Latin word. Now, if "burgensium scholam" be the true reading, that may account well for the "predic?" immediately before, and may make this expression, as one in concord with "burgensium," neither misplaced, nor awkward (in such a composition), nor superfluous. But if it is considered to be an adjective, or a participle agreeing with "necessaria," (a word used, I suppose, substantively), the expression must, if not nonsense, and not strictly improper, be thought uncouth, I suppose, at least; and considered as agreeing with the following substantives in the accusative case, or either of them, probably this "predic?" must be thought superfluous, or render the later "predic?" superfluous. Certainly also it seems to me very difficult, if not impossible, to read "necessaria predic?" as

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"necessaria prædictorum," in the sense of construing the latter word as indicating or comprising the master, under-master, chaplains, and poor. I do not, however, mean to decide, that by "predic^t, burgum scholam" is meant "the aforesaid burgesses' school." I say merely that I think such a reading rationally possible; and, if it is the true reading, the foundation, I suppose, of the argument of the corporation fails.

Assuming, however, the word "burgum" as to be properly read and understood in the accusative case singular, I apprehend that the question remains,—or, if the questions are several, the questions remain,—whether the words "*alia necessaria*" may be read in the sense of not including a reference to the port and bridge, and—whether, from the whole of the contents of the charter taken together, an intention in favour of religious purposes, in favour of education, and in favour of the poor exclusively, does not sufficiently appear. Now, after weighing the several arguments that I have mentioned, and the observations that I have stated as suggesting themselves to me, (nor without bearing in mind the law with respect to the power of corporations, such as the corporation of Boston, over their general property, which prevailed in the time of Philip and Mary, as well as long afterwards), I have arrived, though with some degree of hesitation, at the conclusion, that the contents of the charter, taken together, exhibit an intention upon the part of the grantors in favour of religious purposes, in favour of education, and in favour of the poor exclusively, and therefore that the rents of the lands granted by it are not applicable to any other purpose. Nor do I think the soundness of this conclusion rendered more questionable or more doubtful than otherwise it would be by any prerogative or any peculiar privilege to which the Crown may be entitled as to the mode of construing its grant.

I have, however, excluded hitherto from consideration the effect, if any, which usage ought to have upon the construc-

tion of the charter. Lord *Eldon*, in the *Bristol case* (a), and probably with his usual accuracy, said: "The Statute of Limitations undoubtedly does not apply; but length of time (although it must be admitted that the charity is not barred by it) is a very material consideration, when the question is, what is the effect and true construction of the instrument. Is it according to the practice and enjoyment which has obtained for more than two centuries, or has that practice and enjoyment been a breach of trust? If it has, we must not scruple to disturb it; but still regard must be had to that circumstance."

In the present case, however, I am not satisfied that the usage shewn to have prevailed, so far as there has been usage, is in favour of the present views of the corporation. The particular language of the charter, and the particular position of the corporation with regard to the matters in question, as the law, and their rights and powers, stood before the Municipal Reform Act, must be recollected; and it must be remembered what were their course and mode of action and of management before that act, with reference not merely to the property held under the charter, but also to other property, of which they were merely trustees for purposes in every sense charitable, and to their general property. Looking at the facts and circumstances appearing upon the Master's report, I am of opinion that it would be unsafe and improper to consider the question of the construction of the charter as governed, or illustrated, or affected by usage in a manner favourable to the present contention of the corporation.

(a) 2 Jac. & W. 321.

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Ex parte FRANKLYN, In the Matter of FRANKLYN's Settlement, and In the Matter of THE GREAT NORTHERN RAILWAY ACT, 1846.

Form of order of reference as to temporary investment on a proposed real security of money paid into court upon the purchase of land by a railway company. On the Master reporting against the proposed investment, and that no investment on real security would be for the benefit of the parties — *Held*, that it was competent to the Master so to report; and the Court declined to order the investment to be made.

THIS was the petition of the tenant for life, under a settlement dated the 2nd of March, 1830, whereby certain hereditaments, afterwards sold to the Great Northern Railway Company, were (subject to certain limitations, which had determined) limited and assured to the use of Francis Edmund Franklyn and Elizabeth his wife, during their joint natural lives, and the life of the longer liver of them, with divers remainders over.

Francis Edmund Franklyn died on the 5th of January, 1843, leaving his wife, the petitioner, Elizabeth Franklyn, him surviving.

The Great Northern Railway Company contracted for the purchase of the hereditaments for £5500; and, in pursuance of the contract, paid, on the 25th day of June, 1847, the purchase-money into the Bank of England, to the credit of the Company.

Mrs. Franklyn then presented the present petition, praying that £4500, part of the money paid into court, might be invested upon a mortgage of certain real estate mentioned in the petition, until a proper purchase could be found for the permanent re-investment of the whole purchase-money.

Mr. *De Gex*, in support of the petition, submitted, that the 70th section of the Lands Clauses Consolidation Act, 8 Vict. c. 18, providing that until purchase-money can be permanently re-invested, according to the provisions of the act, it may, upon an order of the Court, be invested by the Accountant-General in the purchase of £3 per Cent. Consolidated Annuities, or Reduced Bank Annuities, or in Government or real securities, was sufficient to warrant the

application; and that, although the act contained no details as to the mode of investment, or in whose name any mortgage was to be taken, the necessary reference to the Master might extend to these particulars.

Mr. *Jolliffe*, for the Company, said they were willing to act as the Court should direct, but submitted whether they could fairly be called upon to pay the extra expenses beyond those which an investment in the funds would occasion.

The VICE-CHANCELLOR said, that the act appeared to sanction temporary investments upon real security, and must be taken to contemplate such investments in the provisions relating to expenses. The proper time, however, for these considerations would be when the Master had made his report.

The following was the form of the order:—

It is ordered, that it be referred to the Master of this court, in rotation, to inquire and state to the Court, whether it will be fit and proper, and for the benefit of the parties interested under the indentures of lease and release, dated respectively the 1st and 2nd days of March, 1830, and under the will of Francis Edmund Franklyn, in the petition named, dated the 10th day of March, 1842, that the sum of £4500, part of the sum of £5500 cash, part of the sum of £10,047 cash in the Bank to the credit of the Great Northern Railway Company, should be laid out at interest on the security of the real estate in the petition mentioned; and, if so, whether a good title can be made to the estate comprised in the said proposed security, and in whose name or names the said security shall be taken.

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In re
 FRANKLYN'S
 SETTLEMENT,
 and *In re*
 THE GREAT
 NORTHERN
 RAILWAY ACT,
 1846.

1847.
Ex parte
 FRANKLYN,
In re
 FRANKLYN'S
 SETTLEMENT,
 and *In re*
 THE GREAT
 NORTHERN
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 1846.

The order then went on to direct the investment, in the meantime, in stock.

On the 14th of February, 1848, the Master made his report, whereby he certified, that he was of opinion and found, that it would not be fit and proper, and for the benefit of the parties interested under the indentures of lease and release, dated respectively the 1st and 2nd days of March, 1830, and under the will of Francis Edmund Franklyn, in the petition named, dated the 10th day of March, 1842, that the said sum of £4500, part of the said sum of £5500 cash, part of the said sum of £10,047 cash in the Bank to the credit of the Great Northern Railway Company, should be laid out at interest on the security of the real estate in the said petition mentioned, or any other real security.

The petitioners then presented another petition, praying that the Master might review his report.

1848. *March 4th.* Mr. *Metcalf*, in support of the petition, contended, that under a reference respecting a particular security, it was not competent for the Master to find that no real security was eligible, which was, in fact, inconsistent with the order. The Court, having before it all the facts as to the situation of the parties, had, by its order, decided that an investment upon real security was for their benefit. The office of the Master was to report on the particulars of the security proposed, and not to reject it on grounds applicable to all real securities.

Mr. *Denison*, for the Company, supported the report, and argued, that, as the extra expenses ought not to be borne by the Company, no real security could be eligible as a temporary investment, except under very peculiar circumstances.

Mr. *Metcalf*, in reply.

The VICE-CHANCELLOR said, that investments upon mortgage had many disadvantages as well as advantages; and, on the whole, he saw no reason for dissenting from the Master's opinion. The order must be merely for payment of the dividends to the petitioners. The Company must pay the costs of the former petition and the proceedings in the Master's office, and each party must pay their own costs of the present petition.

Ordered accordingly.

1848.

Ex parte
FRANKLYN,
In re
FRANKLYN'S
SETTLEMENT,
and *In re*
THE GREAT
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RAILWAY ACT,
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CALLOW v. HOWLE.

1847.

Nov. 5th.

THE plaintiff was the solicitor of one of the defendants before her marriage, and had, in that character, transacted professional business for her. After her marriage, he continued to act as the solicitor of the husband and wife. The husband having become bankrupt, the solicitor instituted the present suit against the husband and wife, and the trustees of their marriage settlement, for payment of his bill of costs out of the wife's separate estate. The first employment of the plaintiff was in 1833, and related to the assignment to the wife, before her marriage, of certain leasehold houses at Hoxton, which were, at the same time, mortgaged by her to secure part of the purchase-money. The item in the bill relating to this business amounted to 23*l.* 17*s.*, including stamps; the items in respect of business before the marriage amounted to 15*l.* 19*s.* 3*d.* The marriage took place in April, 1834, when a settlement was executed, which was prepared by the plaintiff, and whereby the leasehold premises, and other property of the wife, were assigned to trustees, upon trust to pay the rents and profits to the wife for her separate use during her life; and, after her decease,

The circumstance, that the solicitor of a husband and wife has transacted business relating to the separate estate of the wife, is not sufficient to make that estate directly liable for the amount of his bill of costs.

The joint answer of husband and wife may be read against the latter, with reference to her separate state.

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upon trust for such persons as she should by will appoint; and, for want of appointment, upon trust for her legal personal representative or representatives.

One of the trustees declined to act, and on July 22, 1835, deeds were executed by the wife and the trustees, in execution of a power in the settlement, appointing a new trustee, and assigning the trust property to him and the continuing trustee. These deeds were prepared by the plaintiff, and indorsed on the settlement. The husband was not a party to them.

In 1839 the plaintiff delivered his bill of costs to the husband, amounting to 92*l.* 0*s.* 3*d.*, the whole being incurred with reference to the wife's property, except about £2. He received from the husband £5 on account.

In 1840 the wife procured letters of administration to her mother's estate; and afterwards the plaintiff, by the direction, as he alleged, of the husband and wife, brought certain actions of trover to recover part of the mother's estate. In 1844 he took certain proceedings in ejectment, on behalf of the husband and wife, against one of the underlessees of the leaseholds comprised in the settlement. These proceedings were taken in the name of a mortgagee. In November, 1844, the husband paid the complainant £100 on account of the costs payable to the defendant in the action, which left a balance in favour of the husband, and this balance he directed the plaintiff to retain on account of his own fees and disbursements. In 1843 other deeds appointed a new trustee, and the settlement was prepared and executed. On September 13th, 1845, the plaintiff delivered his bill of costs, as the attorney and solicitor of the wife, to the husband, amounting to 399*l.* 14*s.*, which, on the application of the plaintiff, was taxed at 386*l.* 19*s.*

On the 4th of November, 1845, a fiat in bankruptcy issued against the husband, on his own petition.

The prayer was, that it might be declared that the plaintiff was entitled to stand and be considered a creditor against

the separate estate of the wife comprised in the settlement, for so much of his bill as became due for business done by the plaintiff by her direction, for, or on account, or in respect of his or her separate estate, and might be declared to have a lien on the leasehold estates comprised in the settlement and in the title-deeds; and that it might be declared that the plaintiff was entitled to have the amount due to him paid out of the rents and profits of the leasehold estates to accrue during the wife's lifetime; and that the trustees might be decreed to enter into the receipt of the rents and profits, and thereout pay the amount of the plaintiff's bill of costs, or else that a receiver might be appointed; and for an injunction to restrain the trustees from commencing an action of trover against the plaintiff for the recovery of the settlement and the title-deeds to the leaseholds.

It appeared that the plaintiff had gone in under the fiat, and proved for the balance due to him in respect of his bill, after deducting a cross demand of the bankrupt for medical attendance and medicine.

Mr. *Wigram* and Mr. *Younge*, for the plaintiff.

On their proceeding to read in evidence a part of the joint answer of the husband and wife,

Mr. *Kenyon Parker* and Mr. *Spurrier*, for the defendants, objected, that the answer was the answer of the husband, and could not be read against the wife.

Mr. *Wigram* and Mr. *Younge* contended, that, as the question related to the separate property of the wife, the answer must be taken to be hers, as to this.

The *Vice-Chancellor* said, that a plaintiff could not compel a married woman in such a case to answer separately;

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and no authority having been cited to the contrary, his Honor thought that the joint answer of a married woman and her husband might be read against her, as regarded her separate estate.

The objection was overruled, and the case proceeded.

Mr. *Wigram* and Mr. *Younge* cited *Murray v. Barlee* (a) and *Owens v. Dickenson* (b), and contended, that the plaintiff had a lien upon the wife's separate estate for business done in respect of that estate; or that, at all events, his retainer respecting it must, within the principle of the authorities cited, be held an engagement with reference to the wife's separate property.

Mr. *Kenyon Parker* and Mr. *Spurrier*, for the husband and wife, and

Mr. *Russell* and Mr. *Hardy*, for the trustees, were not called upon.

THE VICE-CHANCELLOR:—

The question is not before me, whether the trustees are personally liable, or whether, if the trustees paid Mr. Callow's bill of costs, they would be entitled to retain the amount out of the rents and profits to which Mrs. Elliott is entitled for her separate use. The question before me is, whether Mr. Callow, in respect of this most just demand against some persons or person, has a direct right to resort to the separate property of Mrs. Elliott. It certainly cannot be said that she has, either in writing or verbally, charged that property, or expressly contracted or promised to pay the debt, either out of her separate estate or otherwise. The case against the separate property is put upon the implied contract supposed to arise from the nature of the business

(a) 3 M. & K. 209.

(b) Cr. & Ph. 48.

done, because it has been done mainly in respect of the separate estate.

I must say, and perhaps with some regret, that the case appears to me totally to fail in every other respect than that of the preparation of the deeds indorsed on the settlement, or one of them. In my judgment, the mere circumstance of the business being done relating to the separate property of a married woman, vested in trustees, is insufficient to make that separate property directly liable to the attorney for expenses incurred with reference to it. The trustees may be liable, or some other person may be liable; but it does not appear to me to follow, that the separate property of the wife is directly liable, or that she is liable in respect of the property.

With regard to the deeds indorsed on the settlement, the case as to one of those deeds, at least, might give rise to a question of more difficulty, were it not for the course which Mr. Callow has taken with respect to this demand. But he has delivered his bill of costs for business done, including that in question, to the husband, and in the husband's name, and has treated the husband as solely his debtor, has had his bill taxed on this footing, and has obtained a rule or order for judgment against the husband on the footing of the taxation. The husband became bankrupt, almost, if not quite, contemporaneously with the completion of the taxation. Then Mr. Callow proved the whole amount, as taxed, under the fiat against the husband, as a debt due from the husband alone.

Upon all the circumstances together, I am of opinion, that the Court can neither accede to the demand against the separate estate, nor put the matter in a course of inquiry for the purpose of charging it.

The plaintiff must pay the trustees' costs; with regard to Mrs. Elliott's costs, I will hear her counsel.

Mr. Kenyon Parker and Mr. Spurrier contended, that, as

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the husband was bankrupt, it would be giving a charge on the wife's separate estate not to give her her costs. Now, the principle on which the Court had proceeded, in deciding the question in the cause, extended to the wife's costs also, which could not be charged on her separate estate without some contract entered into by her to that effect.

The VICE-CHANCELLOR dismissed the bill, with costs, as against the trustees; and without costs as against the husband and wife.

Nov. 9th &
 20th.

BANKS v. WHITTALL.

A mortgagee of leaseholds for £1150 enters into a parol agreement with the mortgagor to concur in a new mortgage for £750, to be paid to the original mortgagee in reduction of her debt, so that the new mortgage should be the first charge, but upon an express understanding that the mortgagee should execute to her a second mortgage for the balance.

IN the year 1840 Mr. Banks borrowed of Miss Ledsam £1150, and by an indenture, dated the 19th of October, 1844, he assigned certain leasehold premises to her, for the then residue of a term of 99 years, subject to a proviso for redemption on payment of the said sum, with interest at the rate of £5 per cent. per annum, as therein mentioned.

Miss Ledsam, in 1846, desired Mr. Banks to pay the £1150 and interest, or some part thereof, to her; and Mr. Whittall agreed to advance to Mr. Banks £750, upon Miss Ledsam giving him priority to her security for that sum.

In consideration of her receiving the £750, and upon an express verbal agreement between her brother, as her agent, and Mr. Banks, that Mr. Banks should give her a second

The new mortgage was executed accordingly, and it recited, that the original mortgagee had agreed to accept £750, and to release the premises from the monies secured by the original mortgage, and to make other arrangements with the mortgagor for payment of the residue of the £1150; and the deed witnessed, that, in pursuance of such agreement, and in consideration of £750 paid to the original mortgagee, she and the mortgagor assigned the mortgage premises to the new mortgagee for £750, discharged from the original mortgage. Afterwards, the £750 was paid off by another person, to whom the mortgagor applied for that purpose, on an agreement for an assignment; but all parties had notice of the agreement with the original mortgagee. On the original mortgagee filing a bill to be declared first incumbrancer, or to redeem—*Held*, that she might adduce parol evidence of the agreement with her, and was entitled to redeem on payment of the £750 and interest, but had not a lien prior to that of the person who had last advanced that sum.

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mortgage for £400, the balance which would remain due to her after receiving the £750, Miss Ledsam, through her brother, consented to this arrangement; and, accordingly, an indenture, dated the 25th of July, 1846, and made between Miss Ledsam of the first part, Mr. Banks of the second part, and Mr. Whittall of the third part, was executed by them; by which it was recited, that the £1150 remained due on the security to Miss Ledsam, and that she had agreed to accept the sum of £750 in cash, and, upon payment thereof, to release the premises from the monies secured by the mortgage, and to make other arrangements with Mr. Banks for payment of the residue of the sum of £1150. The operative part expressed, that, in consideration of £750 to Miss Ledsam paid by Mr. Whittall, Miss Ledsam assigned, and Mr. Banks granted and confirmed, the mortgaged premises unto Mr. Whittall, for the residue of the term of 99 years, discharged from the mortgage security to Miss Ledsam and from the condition therein contained, but subject to a new proviso for redemption.

No new security was given to Miss Ledsam at the time of her executing the assignment to Mr. Whittall; but Mr. Banks, in the presence of Mr. Whittall, promised, that, in a day or two afterwards, he and Miss Ledsam's brother and agent would give to Mr. Stubbs, who was the solicitor in all these transactions, instructions for a new mortgage security to Miss Ledsam. Mr. Banks afterwards refused to give Miss Ledsam any such security.

On the 18th of January, 1847, Mr. Banks applied to Mr. Smith, a solicitor, to lend him £750, and to pay off Mr. Whittall. Mr. Smith applied at the offices of Mr. Stubbs, the solicitor who had prepared the deeds of the 19th of October, 1844, and of the 25th of July, 1846, as to the particulars and value of the mortgaged premises; and Mr. Smith was then informed of the nature of the transaction between Mr. Banks and Miss Ledsam, and he was cautioned against making any advances to Banks.

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Notwithstanding this information, Mr. Smith agreed to advance to Mr. Banks money sufficient to pay off Mr. Whittall.

On the 19th of January, 1847, Mr. Smith and Mr. Banks, without any previous intimation on the subject, went to the residence of Mr. Whittall, and Mr. Smith tendered to Mr. Whittall the £750 secured to him, with all interest due, and six months' interest in advance, and required the immediate delivery of the title-deeds on mortgage to him. Upon an intimation by Mr. Smith, that he would incur considerable responsibility if he refused to comply, Mr. Whittall, who was advanced in years, and of a timid disposition, received the money and gave up the title-deeds to Mr. Smith, and signed a memorandum, purporting to be a receipt for the £750 and interest, and an agreement to re-assign the premises, which Mr. Smith indorsed upon the deed of the 25th of July, 1846, for that purpose.

Two days afterwards, Mr. Banks and two clerks of Mr. Smith called on Mr. Whittall, and tendered to him an indenture, purporting to be made between Mr. Banks of the first part, Mr. Whittall of the second part, and Mr. Smith of the third part, being a transfer of Mr. Whittall's mortgage to Mr. Smith, for Mr. Whittall's execution, it having been previously executed by Mr. Banks.

Mr. Whittall refused to execute this deed without the sanction of Mr. Stubbs, who was his solicitor, as well as the solicitor in the former transactions between Miss Ledsam and Mr. Banks.

Mr. Stubbs, as Mr. Whittall's solicitor, advised him not to execute the deed, on the ground that Miss Ledsam had an equitable lien on the mortgaged premises for the difference between £750 advanced by Mr. Whittall, and the £1150 and interest secured by the deed of the 19th of October, 1844, to her.

Under these circumstances Mr. Banks and Mr. Smith filed a bill against Mr. Whittall, to enforce an assignment of

the mortgaged premises by Mr. Whittall to Mr. Smith. Mr. Whittall, by his answer, after stating the above circumstances, objected that Miss Ledsam was a necessary party to the suit.

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The cause was set down, upon this objection, for want of parties, and was argued on the 4th of May, 1847, when his Honor ordered the objection to stand over until the hearing of the cause, without prejudice to either party.


On the 15th of May, 1847, Miss Ledsam filed her bill against Mr. Banks, Mr. Smith, and Mr. Whittall, charging that the execution by her of the deed of mortgage to Mr. Whittall was in part performance of the verbal agreement between her and Mr. Banks, and that she had a lien on the premises for the balance of the money which had been secured to her; and that, under the circumstances, the payment to Whittall let in her lien as a first charge on the premises; and praying a declaration accordingly, or, at least, that she might be at liberty to redeem Mr. Smith, and to add her own debt to the money to be paid to him, and for a foreclosure decree against Mr. Banks.

Mr. Smith and Mr. Banks, by their answer, claimed the benefit of the Statute of Frauds against Miss Ledsam.

Evidence was gone into in both causes; and Mr. Whittall, the sole defendant in the first cause, obtained an order that the parties in each cause might be at liberty to read the evidence in both causes.

Both causes came on together by order.

Mr. *Bacon* and Mr. *Amphlett*, for Mr. Banks and Mr. Smith, the plaintiffs in the first cause, and two of the defendants in the second cause.—The two causes are distinct. Mr. Smith, having paid off Mr. Whittall, has a right to be placed in Mr. Whittall's position as to security. The mortgage to Mr. Whittall must be taken to represent the transaction truly, and by that deed Miss Ledsam entirely discharged the premises from all claim by her. If it were



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meant that any debt should remain due to Miss Ledsam, that was a personal debt, for recovery of which she has, under these transactions, Mr. Banks' personal security only; and, in the absence of any written agreement, she cannot enforce a claim to have any security against the land. This would be to do what it was the intention of the Statute of Frauds to prevent.

Mr. *Russell* and Mr. *Twells*, for Miss Ledsam, the plaintiff in the second and a defendant to the first suit.—The parol agreement to give the second charge to Miss Ledsam is distinctly proved by four witnesses. In consideration of that agreement, Miss Ledsam performed her part of the agreement, by executing the mortgage to Mr. Whittall.

The mortgage to Mr. Whittall recites, that Miss Ledsam had agreed to make other arrangements with Mr. Banks for payment of the balance due to her. If a deed states "other considerations," it is competent for a party to go into parol evidence to shew what those considerations are. Such considerations being stated in this case, Miss Ledsam is entitled to go into parol evidence, and it sustains her lien. Under the circumstances, the payment by Mr. Smith must be taken to be payment by Mr. Banks, and to let in Miss Ledsam as having the first lien, although it may be that Mr. Smith is an incumbrancer, subject to Miss Ledsam's charge.

Mr. *Craig*, for Mr. Whittall, submitted to act as the Court should direct.

The VICE-CHANCELLOR:—

The decree must be in both causes.

As to the first suit of *Banks v. Whittall*, the plaintiffs having elected to construct their case so as to exclude Miss Ledsam, I cannot make her liable to the costs of that suit, to which she is a stranger.

As between the plaintiffs in the first suit, Smith and Banks, whom in it I must treat as being one in interest, and the defendant Whittall, he is entitled to his costs to this time from them, and I have no means of making any other person liable to pay them. The plaintiffs must, therefore, pay these costs to this time, in the first suit, subject to the qualification, that, as to such evidence as has been gone into by Mr. Whittall on matters not in issue in that suit, I cannot give him costs; and he must pay the plaintiffs' costs, so far as they are increased by such evidence, and these costs must be set off and deducted.

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As to the costs of the suit of *Ledsam v. Banks*, Miss Ledsam must pay Mr. Whittall's costs, and add them to her own. There must be no costs as between her and Mr. Smith, and there must be no costs as between her and Mr. Banks, except such as will be included in her costs of suit, for which I shall provide.

As to the charges on the estate, I am of opinion, that Miss Ledsam has established an equitable lien as an incumbrancer for 400*l.*, the balance remaining due to her after the payment of the 750*l.* to her, with interest. That, however, appears to me a charge second to Mr. Whittall's security, to which Mr. Smith is entitled; and I am of opinion, that, whatever may be the strictly technical view of the case, it would be too hard to treat the charge of 750*l.* as extinguished, so as to give Miss Ledsam priority to Mr. Smith, whose money it was that paid off Mr. Whittall.

Miss Ledsam is to be at liberty to redeem Mr. Smith, and thereupon there must be an assignment by Mr. Whittall to her; but I do not think there need be any assignment by Banks and Smith, or either of them, as she will have the legal estate.

If Miss Ledsam does not pay Mr. Smith, she will be foreclosed. If Miss Ledsam does pay off Mr. Smith, then Mr. Banks must redeem her, and she will then have what she shall have paid Smith—her own debt and costs, and the costs

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she will have paid to the defendant Whittall. If Banks does not pay all those, he will be foreclosed.

Let the defendant Whittall assign the legal estate without prejudice; and thereupon let the bill be dismissed against him.

Mr. Smith to have no costs to this time; I have some doubt whether he should be allowed the costs of taking the accounts in the Master's office.

His Honor intimated that he would mention the case again on a subsequent day.

Nov. 20th.

His Honor said, his further consideration of the case had confirmed his previous judgment: he was satisfied, that, when Mr. Whittall received his mortgage-money and interest, it ought not to be assumed that he had agreed to do anything, and that he was under no obligation to do what he did.

His Honor's impression was, that Mr. Whittall was not compellable to assign the premises without the consent of Miss Ledsam.

Messrs. Banks & Smith appealed from his Honor's judgment; but their appeal was, on the 3rd of May, 1848, dismissed, with costs, by the Lord Chancellor.

1847.

OHRLY v. JENKINS.

THE plaintiff in this case, a first mortgagee, filed a foreclosure bill against a second mortgagee and the mortgagor.

The answer of the second mortgagee disclaimed all interest; but it was at some length, and it did not allege that he never had claimed any interest.

Mr. *Beavan*, for the plaintiff, asked for the usual foreclosure decree.

As to the costs of the second mortgagee, he is not, upon the authority of the more recent decisions, entitled to them.

In *Appleby v. Duke* (a), it was held, that the provisional assignee, under the Insolvent Act, of an insolvent mortgagor, if made defendant in that character to a bill of foreclosure, is not entitled to costs from the mortgagee plaintiff.

[*Grigg v. Sturgis* (b), *Gabriel v. Sturgis* (c), and *Gibson v. Nicol* (d) were also referred to.]

Mr. *W. W. Cooper*, for the defendant, the second mortgagee. —According to the older practice, a second mortgagee disclaiming, if he had been brought to the hearing, was clearly entitled to his costs, which the plaintiff paid, and added to his debt. Though that practice may not have been followed in every case more recently, yet the practice is not entirely altered; and the costs may be given, if the Court think fit.

There is this special circumstance in the present case, that the plaintiff has replied to the second mortgagee's answer, which puts the defendant's denial of interest in issue; and this entitles the defendant to his costs for the vexation (e): *Williams v. Longfellow* (f).

Nov. 12th.

Where, on a bill of foreclosure by a first mortgagee against a second mortgagee and the mortgagor, the second mortgagee, by his answer, disclaimed, yet the plaintiff brought the second mortgagee to the hearing, no costs were given to the second mortgagee on the decree against him, upon the preponderance of modern decisions, though, formerly, the practice was to give such disclaiming second mortgage defendant his costs, the plaintiff adding such costs to his own.

(a) 1 Ph. 272.

(b) 5 Hare, 93.

(c) Ib. 97.

(d) 9 Bea. 403.

(e) Wyatt's Prac. Reg. 176.

(f) 3 Atk. 582.

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In *Glover v. Rogers &c.*, a defendant, A., by answer, stated that he had assigned to B. whatever interest he ever had in the subject-matter of the suit, and disclaimed. The bill was thereupon amended, by adding B. as a defendant. B., by his answer, admitted such assignment, and claimed to be solely entitled to the interest of A. The plaintiff filed a replication to both answers. At the hearing, A. was dismissed, with costs.

[He also cited *Topping v. Power* b.]

The VICE-CHANCELLOR:—

Some of the cases cited are cases of disclaimer by the assignee of a bankrupt or insolvent. I am not prepared to view these cases and the case of a puisne incumbrancer as identical.

When I first came to the Bar, it was, I believe, the constant practice to give to a defendant who was a puisne incumbrancer, and disclaimed, his costs, and to direct the plaintiff to add them to his own: but the preponderance of modern decisions appears to me to be too strong to enable me to give the defendant his costs.

Intimating no opinion as to which is the better course, I must decline to give this second mortgagee his costs.

(s. 11 Jur. 1000; S. C. 17 L. J., N. S., Chanc., 2.

(3) 1 Hare, 405.

1848*.

Re THE NORTH OF ENGLAND BANKING COMPANY, and *Re* THE JOINT-STOCK COMPANIES WINDING-UP ACT, 1848. *Nov. 17th.*

THIS was one of the first petitions under the 11 & 12 Vict. c. 45, having the short title of "The Joint-stock Companies Winding-up Act, 1848." In the course of the proceedings under the petition several important cases arose for decision.

Form of petition, order, and proceedings under the Joint-stock Companies Winding-up Act.

On these accounts the forms of the introductory proceedings are given in detail.

The petitioners were shareholders in a banking company at Newcastle-upon-Tyne, called "The North of England Joint-stock Banking Company," and established in conformity with the provisions of the Joint-stock Banking Act, (7 Geo. 4, c. 46).

The petition, after setting out the deed of settlement of the company, dated the 14th of November, 1832, stated, that the company had carried on business from 1832 till 1847.

That during such period changes were from time to time made in the body of persons who constituted the shareholders, and the shares of the company were bought and sold, and transfers were made, pursuant to the provisions of the deed of settlement, and that changes were also made in the board of directors of the company.

That during the same period profits were from time to time made, or considered to be made, by the said business, and sums were allotted to the shareholders in the company, as dividends upon their respective shares.

That in the beginning of the year 1847 the affairs of the company became embarrassed, and that on the 6th day of March, 1847, the company ceased to carry on the business of

* This and the following cases, relating to the construction and operation of the Winding-up Act of 1848, are given out of their chronological place, on account of their novelty and importance.

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OF ENGLAND
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banking, or any further business than was necessary for the dissolution of the company and the winding-up of its affairs.

That the shareholders were from time to time convened, and several calls were made to meet the claims upon the company, but many of these calls remained unpaid and unenforced; and that, although some of the shareholders made loans to the company, large liabilities of the company remained unliquidated.

That many of the creditors of the company had taken proceedings against the public officers of the company, and recovered their demands against some of the individual shareholders, and that other proceedings were still pending.

That the petitioners were all of them shareholders in the company, and duly registered as such, and were liable for the debts and engagements of the company.

That there was still due and owing to the creditors of the company a very large sum, amounting to 300,000*l.* and upwards.

That the company had not been dissolved under the provisions of the deed of settlement.

That a very large number of the shareholders had not paid the call that had been made by the directors since the stoppage of the bank, and that no sufficient means existed, except under the powers conferred by the Joint-stock Companies Winding-up Act, 1848, to compel a due contribution from such of the said shareholders as had not paid.

That certain of the shareholders had advanced, as loans, considerable sums beyond the amounts due in respect of the calls made upon them, and that no sufficient means existed, except under that act, to have the accounts taken of what was due to each shareholder respectively.

That various questions would arise, in the winding-up of the affairs of the company, which could only be settled under the provisions of the act.

That the petitioners had been advised, and believed, that it would be for the interest of the shareholders in the

company, that its affairs should be wound up under the provisions of the act, and that it should be declared by this Court to be absolutely dissolved. And the petitioners prayed, that an order absolute might be made for the dissolution and winding-up of the North of England Joint-stock Banking Company, under the provisions of the Joint-stock Companies Winding-up Act, 1848, and that it might be referred to James William Farrer, Esq., one of the Masters of the Court, to wind up the affairs of the company, under the provisions of the said act, and for general relief.

Upon the hearing of the above petition, the following order was made on the 17th of November, 1848:—

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“Whereas John Henderson, John Hewson, Ebenezer Robson, Samuel Hedley, and James Ross, being contributories of the said company, and directors, duly appointed, after the stoppage of the said banking company, did, on the 10th day of November, 1848, prefer their petition unto the Right Hon. the Lord High Chancellor of Great Britain, setting forth as therein is set forth, and praying that an order absolute might be made by this Court for the dissolution and winding-up of the said North of England Joint-stock Banking Company, under the provisions of the Joint-stock Companies Winding-up Act, 1848, and that it might be referred to James William Farrer, one of the Masters of this Court, to wind up the affairs of the said company, under the provisions of the said act; whereupon all parties concerned were ordered to attend his Lordship on the matter of the said petition, and counsel for the petitioners this day attending accordingly. Upon hearing the said petition, an affidavit of Samuel Hedley, and an affidavit of service, on the 11th day of November instant, of the said petition, on the principal accountant of the said company, at the only office of the said company, and of notice of the presentation of the said petition to each of the shareholders of the said company, and the London Gazette of the 9th day of November instant, the Newcastle Guardian, the Newcastle Journal, and the Gateshead Observer, respectively, of the 11th of November instant, now severally produced, containing an advertisement of the said petition, were read, and what was alleged by counsel for the

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petitioners. THIS COURT DOETH ORDER, that the said North of England Joint-stock Banking Company be absolutely dissolved, as from this day, and be absolutely wound up, under the provisions of the Joint-stock Companies Winding-up Act, 1848. AND IT IS ORDERED, that it be referred to Mr. Farrer, one of the Masters of this Court, to wind up the affairs of the said company, under the provisions of the said act."

Under this order, Messrs. John Henderson, John Hewson, and James Robson were appointed by the Master the official managers of the company, and made out a list of the contributories, as required by sect. 76 of the act, which, as settled by the Master, was in the following form:—

NAMES.	ADDRESS.	In what Charac- ter included.	For how many Shares of 100l. each.	What other Interest (if any).	REMARKS.
Mrs. Mary Angas	. High Swinburne-place, Westgate-street, New- castle.	. . .	} 40		
Mr. John Lindsay Angas.	. Ditto . . .	. in right of his wife.			
Miss Howe Chartres	. Haddington, N. B. .	. . .	6		
Miss Jemima Chartres.	. Haddington, N. B. .	. . .	6		
Cuthbert Smith Fenwick, Esq.	. Shipowner, Tynemouth, Northumberland.	. . .	200		
Henry Fenwick, Esq.	. Solicitor, Mr. G. Brown Harrison, Liverpool.	. . .	122		
John Fenwick, Esq.	. Preston Villa, North Shields.	. . .	304		
Mr. Thomas Gla- holme.	. Miller, Bridge-end, Newcastle.	. . .	12		
Mr. William Arm- strong.	. Morley-street, New- castle.	. . .	6		
Mr. James Hut- chinson.	. Blandford Arms, Bland- ford-street, New- castle.	. . .	5		
Mr. Thos. Reaveley	. Saville-row, Newcastle	. . .	66		
Miss Mary Ann Thomas.	. Sunderland . .	. Executrix of John Ness.	48		

The Master, in the course of settling the list, made up a supplementary list, headed as follows:—"Contributories" list. Additional names to list, added by the Master in the course of settling," which was in the following form:—

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NAMES.	ADDRESS.	In what Character included.	For how many Shares of 100l. each.	What other Interest (if any).	REMARKS.
William Hawthorn	Forth Banks, Newcastle-upon-Tyne.	. . .	. 12 .	. .	. Settled, liable to all losses (if any) up to the 1st January, 1847, inclusive. 22nd December, 1848.
Robert Hawthorn	Forth Banks, Newcastle-upon-Tyne.	. . .	. 18 .	. .	. Settled, liable to all losses (if any) up to the 1st January, 1847, inclusive. 22nd December, 1848.

The foregoing list was thus settled by the Master, after hearing and disposing of each case.

A notice to the following purport was placed in the office of the Master to whom these proceedings were referred:—

"In all cases of executors and administrators, where they are put upon the list of contributories as personal representatives, that description must be understood to limit their liability to the extent of the assets of the testator to be applied in a due course of administration.

"J. W. FARRER.

"8th December, 1848."

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Shares in a banking company were purchased for an infant without disclosing his infancy, the vendor signing a certificate, required by the company's rules, that the purchaser was of age. On the discovery of the infancy, the infant's father covenanted with the public officer, and two directors of the company, that the infant should perform the agreements contained in the company's deed of settlement, and to indemnify the company:—
Held, that the father's name was properly placed on the list of contributors, under the Winding-up Act, 1848.

BETWEEN 1837 and 1844, sixty shares in the North of England Banking Company were purchased in the name of one Thomas Reaveley the younger, with monies given for the purpose by his grandmother. On the transfer of the shares to him, in pursuance of the provisions of the company's deed of settlement, the retiring shareholder signed a notice of transfer to the directors, certifying, as was usual and requisite, that Thomas Reaveley the younger was of the full age of twenty-one years. The usual deeds of transfer were thereupon executed by the retiring shareholder of the first part, Thomas Reaveley the younger of the second part, and two managing directors of the company of the third part, in which Thomas Reaveley the younger covenanted with the two directors to pay all calls and liabilities, and perform all obligations in respect of the shares, and also to execute all deeds of covenant to abide by the rules of the company to be prepared for the purpose.

The usual certificates, that Thomas Reaveley the younger was the owner of these shares, were thereupon issued, and given to him.

It having been discovered that Thomas Reaveley, junior, was a minor, a deed was executed on the 22nd of March 1842, by his father, Thomas Reaveley the elder, of the first part, one of the registered public officers of the company of the second part, and two managing directors of the company of the third part; whereby, after reciting that the said Thomas Reaveley the elder had purchased divers shares in the company for and on account of his son, Thomas Reaveley the younger, and that the same shares had been transferred to Thomas Reaveley the younger, with the consent of the managing directors of the company, upon declaration that Thomas Reaveley the younger, as su

purchaser, was of the full age of twenty-one years; and the fact that Thomas Reaveley the younger was, at the respective times when the shares were so transferred to him in the books of the said banking company, and at the time he executed the deed of transfer and entered into the covenant set forth therein, and then continued, a minor; and that such purchase and transfer were entered into and executed in ignorance, by the said Thomas Reaveley the elder, of the regulations of the banking company; and that he had, at the request of the directors of the banking company, agreed to enter into covenants to indemnify the banking company against all losses by reason of the said Thomas Reaveley the younger not being of the age of twenty-one years; and that the said Thomas Reaveley the elder had received, as the guardian of the said Thomas Reaveley the younger, various dividends; and that it had been agreed that he should continue to receive, as such guardian, the dividends thereafter to grow due in respect of the said shares, on his entering into the covenant thereafter contained: the said Thomas Reaveley the elder covenanted with the parties thereto of the second and third parts, that Thomas Reaveley the younger should, at all times, as well in respect of the said shares thereinbefore referred to, as in respect of any other shares of which he, whilst under the age of twenty-one years, should, with the approbation of the board of directors of the said banking company, become the proprietor, pay all instalments that might be duly required thereon, and observe and perform, and in all other respects keep, all the covenants, agreements, and provisions contained or referred to in the then present or any other deed of constitution of the banking company, and all other regulations affecting holders of shares in the company, so far as the same ought, on the part of Thomas Reaveley the younger, to be kept; and also that Thomas Reaveley the younger should, upon his attaining his age of twenty-one years, execute

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the deeds of constitution of the banking company: and the said Thomas Reaveley the elder also covenanted to indemnify all the members of the banking company against all losses, costs, damages, and expenses, by reason of Thomas Reaveley the younger being under the age of twenty-one years.

Thomas Reaveley the elder received all the dividends payable in respect of the sixty-six shares until the company stopped payment, giving the company receipts, signed "For Thomas Reaveley, junior—Thomas Reaveley."

The official manager inserted the name of Thomas Reaveley the elder, as a "contributory" to the company, in the list made up by him in pursuance of the direction contained in sect. 91 of the Winding-up Act.

After argument before him, the Master settled the list of contributories, retaining the name of Thomas Reaveley the elder on the list without limitation (*a*), and gave the following written memorandum of the grounds of his decision:—

"For the purpose of coming to a right conclusion on this and the numerous other disputed cases, it is necessary to put a construction on the term 'contributory' in sect. 3(*b*) of the act; or rather to put a construction on the interpretation which the clause gives of the term 'contributory.'

"The interpretation contains several descriptions:—

"First, every member of a company.

"Secondly, every person liable to contribute to the payment of any of the debts, liabilities, or losses of a company; as real or personal representative or devisee.

"Thirdly, every person liable to contribute, &c.; as a former member of a company.

"Fourthly, every person liable to contribute, &c.; as real or personal representative or devisee of a member of a company deceased.

(*a*) Vide ante, p. 548.

(*b*) Vide post, p. 554, n. (*a*).

"Fifthly, every person liable to contribute to the payment of &c., 'or otherwise howsoever.' It is contended that the words 'otherwise howsoever' only mean persons ejusdem generis with the persons previously described; and I presume the case of *Rex v. Whitnash* (a) would be considered an authority establishing that rule of construction. I doubt the application of that rule of construction to an interpretation clause; be that as it may, the rule of construction established by the case referred to must depend upon the object and scope of the enactment.

"The object and scope of this act are much greater than merely to make the four first classes contributories. It was known to the legislature that many other persons were liable to contribute to the payment of debts, &c. of a company; and that, under such varying circumstances, it was impossible to describe them by any known term, or to enumerate them. Therefore the words 'otherwise howsoever' were used emphatically, to bring such persons within the operation of the act. The word 'contributory,' throughout the act, must be construed by reference to the interpretation. The very expression of the act, 'winding-up,' strongly confirms this more extended construction of the word 'contributory;' and see 'finally wind up and settle,' in the 8th section.

"This construction of the act will be applicable to each case which the official manager claims to bring within it.

"He claims to put Thomas Reaveley the father upon the list of contributories. I think he has a right to do so.

"The deed of covenant of March, 1842, renders the father, I think, liable to contribute, within the before-mentioned 5th class of persons.

"I consider him a contributory, though a trustee for his infant son; by agreement, (under seal), he puts himself in the place of his son, so far as regards any liability incurred

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during the son's minority; he covenants to pay all instalments in respect of calls duly made. Calls ordered by this Court are, I think, within the covenant to pay such instalments.

"I propose to put Thomas Reaveley the father upon the list of contributories.

"J. W. FARRER.

"8th December, 1848."

Mr. Reaveley, having obtained the Master's certificate of the above decision, gave a notice of motion under s. 99 of the act, entitled in the matter of the act and of the company, that the Court would be moved, before his Honor the Vice-Chancellor Sir James Lewis Knight Bruce, "that the said decision of the Master might be reversed, and that his name might be struck out of, and excluded from, the list of contributories of the company."

Mr. *Russell* and Mr. *Manisty*, for the motion.—The son's name alone is on the register of shareholders. The directors have accepted the son's name, and the company cannot now have the father also.

The Winding-up Act, 1848, s. 39, clearly contemplates minors as shareholders.

The father may be liable, under the ordinary remedies, for any damage the company may sustain, if the son does not fulfil the obligations of a shareholder of the company; but these remedies can arise only after the damage shall have occurred; and it may be, that the son, who alone is entitled to the profits, will fulfil all the obligations in respect of his shares.

The father does not come within the definition of "member," or "contributory," contained in sect. 3 (a).

(a) By the Winding-up Act, 1848, s. 3, after providing, "That the following words and expressions in this act shall have the meanings hereby assigned to them respectively, so far as such

The object of this act is not for the benefit of the creditors against the company; it merely gives a mode of arranging the equities between the members; but the act has not imposed new or original obligations on persons to which they were not previously liable. A right to share in the profits is the condition of the application of the provisions contained in the act. Now, if the covenant of the father renders him liable to have his name inserted as a contributory, there is no reason why the name of every debtor to the company should not be inserted in this list. Another test of the father's liability to be on the list is this—whether, before the passing of this act, a bill could have been filed against the father as a member of the company. If not, this act will not extend to him.

All the provisions of the act proceed upon the principle, that a contributory is a person having a share, or representing a shareholder, in the company; and they tend to support the argument, that the act was not intended to include within its operation persons not previously liable as partners.

HIS HONOR inquired whether there was any liability to the company in respect of these sixty-six shares to which the father had not subjected himself?

Mr. J. Russell.—The father is only liable upon his cove-

meanings are not excluded by the context, or by the nature of the subject-matter; it is provided as follows:—

“The word ‘member’ shall mean any person entitled to a share of the assets or accruing profits of any such company at the time of presenting the petition for dissolving the same, or winding up the affairs thereof under this act.

“The word ‘contributory’ shall

include every member of a company, and also every other person liable to contribute to the payment of any of the debts, liabilities, or losses thereof, whether as heir, devisee, executor, or administrator of a deceased member, or as a former member of the same, or as heir, devisee, executor, or administrator of a former member of the same, deceased, or otherwise howsoever.”

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nant to indemnify the company against the consequences that may result to them from the non-payment by the son. At this moment there is no actual liability existing of any kind in any one.

Mr. *Bacon*, Mr. *Lloyd*, and Mr. *Headlam*, for the respondents, the official managers, were not called upon by the Court.

The VICE-CHANCELLOR:—

Independently of the great respect due to the opinion of Mr. Farrer, there is so much good sense and fairness in the conclusion to which he has come in this respect, that it would be with the greatest regret that I should find myself placed under the necessity of differing from him: but I do not find myself placed under that necessity.

How this case would have stood if the minor had attained majority—how the case would have stood if the company had not been actually dissolved, or how the case would have stood if its affairs had not been directed to be wound up under the provisions of the act of Parliament that has been so often mentioned, it is unnecessary to say. I have to deal with the case as it actually stands before me; and looking at the contents of this deed, not only as far as its operative part is concerned, but also as far as its recitals are concerned, I am of opinion that the Master has come to a sound conclusion in inserting the name of Mr. Reaveley the elder in the list of contributories to the company, as a contributory, without qualification, in respect of sixty-six shares. I must, therefore, refuse this motion, and I refuse it with costs.

An appeal from this decision was, on the 11th January, 1849, dismissed with costs (a).

(a) 1 H. & T. 118.

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FENWICK'S CASE.

Feb. 28th.

IN the year 1842, Mr. Richard Fenwick purchased 195 shares in the North of England Joint-stock Banking Company, in the name of his brother, Mr. John Fenwick, as a trustee for John Richard Fenwick and George Fenwick, two sons of Mr. Richard Fenwick, who were minors.

Mr. John Fenwick's name was entered in the share register of the company, as trustee for John Richard Fenwick and George Fenwick, the minors.

In September, 1843, Mr. Richard Fenwick and Mr. John Fenwick entered into the following agreement:—

“It is this day mutually declared and agreed between us the undersigned Richard Fenwick and John Fenwick, that the under-mentioned shares, namely, [the shares were specified, and included the 195 in the North of England Joint-stock Bank,] are held by the said John Fenwick in trust for John Richard Fenwick and George Fenwick, (sons of the said Richard Fenwick), and that the said Richard Fenwick is entitled to the dividends, profits, and emoluments arising from the said shares, until his said sons, John Richard and George, shall attain their respective ages of twenty-one years; and the said John Fenwick further declares, that on the said John Richard Fenwick and George Fenwick attaining their majority, or at the request of the said Richard Fenwick, the said John Fenwick shall and will transfer the said shares so held by him in trust as aforesaid unto the said John Richard Fenwick and George Fenwick, their executors, administrators, or assigns, or to such other person or persons as they, or any of them, may appoint. And the said Richard Fenwick, his heirs, executors, and administrators, doth hereby agree to

A father purchased shares in a joint-stock bank, for two infant sons, in the name of their uncle as a trustee, and the uncle's name was so entered on the share register of the company. By an agreement afterwards entered into, the uncle admitted that the father was entitled to the profits of the shares till the minors became of age, and it was agreed, that then the uncle should assign the shares to the two minors, and the father agreed to indemnify the uncle in respect of the shares. The uncle received the dividends, and paid them to the father:—*Held*, that the father's name ought not to be inserted on the list of contributories, under the Winding-up Act, 1848.

A man may be liable to the creditors of a company without being liable to have his name

inserted in the list of contributories.

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hold the said John Fenwick, his heirs, executors, administrators, and assigns, harmless and indemnified against all losses, damages, failures, and expenses, which may from henceforth arise, for or by reason or on account of the said shares so held by him the said John Fenwick, his executors, administrators, and assigns, in trust for the said John Richard Fenwick and George Fenwick, their heirs, executors, administrators, and assigns.—Dated this 6th day of September, 1843.”

The name of Mr. John Fenwick continued, until February, 1848, to be on the share register as the sole owner of these 195 shares, as trustee, until the month of February, 1848, and he acted and was treated as to such shares as the sole owner; but on receipt of the dividends from time to time, he paid them over to the credit of an account of Mr. Richard Fenwick with the banking company.

Mr. John Fenwick paid three calls made upon the shareholders by the directors with money which Mr. Richard Fenwick raised out of the property of the infants.

After the bank had stopped payment, and advances by way of loan were required by the directors from the shareholders, Mr. John Fenwick declined to make any advance, alleging that he was only a trustee.

Mr. Richard Fenwick had never been recognised by the company as having any interest whatever in the company.

The 12th article of the deed of settlement of the company provided as follows:—“The person in whose name any shares shall stand in the shareholders’ register, shall, to all intents and purposes whatsoever, within the meaning of the deed of settlement, be deemed at law and in equity the absolute, sole, and beneficial holder and owner of such shares; and shall, as such, be the only person known to or recognised by the company in all votes, transfers, notices, payments, receipts, and other matters relating to the same shares; and the company shall in no case be bound to notice, or be affected with express notice of, any trust or equitable

charge imposed on any shares, or with any gift thereof by way of legacy, until the legatee shall have become a shareholder as hereinafter mentioned."

John Richard Fenwick, one of the sons, attained his age of twenty-one years in September, 1848. The official managers had placed the name of Mr. Richard Fenwick upon the list of contributories; but the Master struck his name out, retaining the name of John Fenwick upon the list (a).

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Mr. *Bacon*, Mr. *Lloyd*, and Mr. *Headlam* now moved, on the part of the official managers, that the name of Mr. Richard Fenwick might be placed on the list.

Richard, by the terms of the agreement, became, at least until both sons became of age and should claim the shares, the beneficial owner of those shares; and receiving, as of right, the dividends, he was liable to the creditors of the company; and being such, he became liable to have his name inserted in the list of contributories.

The 3rd section of the act (b) defines a contributory to be any person liable to contribute to the payment of any of the debts and liabilities of the company, and it cannot be denied that Mr. Richard Fenwick is so liable.

In *Barklie v. Scott* (c), Mr. Justice Burton said, that, if a person wanting to put money into trade for his own benefit, embarked a sum in a partnership in his son's name, reserving to himself the power of drawing it, or any profits, out, there could be no question that a person so acting would be liable as a partner. Apply that principle to the present case, and Mr. R. Fenwick's name should be inserted in the list.

Mr. *Lee* and Mr. *E. S. Williams*, for Mr. Richard Fenwick, were not called on by the Court.

(a) Vide ante, p. 548.

(b) Vide ante, p. 554, n. (a).

(c) *Hudson and Brooke*, Ir. Rep. 87.

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The VICE-CHANCELLOR:—

A man may be liable to the creditors of the company, who may not be liable *inter socios*.

In this case Mr. Richard Fenwick may or may not be liable to indemnify Mr. John Fenwick; he may or may not be liable to all the creditors of the company: but these are not questions before me. The present question is, whether Mr. R. Fenwick is a person whose name, for the purposes of this act, ought to be inserted in the list of contributories. I am of opinion that his name ought not to be in the list. I must refuse the motion, with costs.

Jan. 16th.

ANGAS'S CASE.

A married woman became, by such description, a registered shareholder in a joint-stock banking company, having purchased the shares with money arising from her separate estate.

The husband occasionally received the dividends on the shares, but always signed the receipts as his wife's agent. Though not a registered shareholder, he attended some

MRS. MARY ANGAS, the wife of Mr. John Lindsay Angas, became, by such description, with her husband's knowledge, the registered proprietor of shares in the North of England Joint-stock Banking Company. The shares were purchased with monies arising from the separate estate of Mrs. Angas; but it was not proved that the directors had notice of this circumstance.

The dividends were very frequently received by Mr. Angas, who occasionally signed the receipts thus: "For Mary Angas, John L. Angas;" and at other times, "John L. Angas, per proc. Mary Angas;" but he never signed any receipt for dividends in his own name alone.

In the returns of the list of shareholders made to the Stamp Office, the name of Mrs. Angas was inserted until

meetings, and once held the proxy of an absent shareholder, which, according to the deed of settlement, a shareholder alone could do, and he took part in the proceedings. Previously to the dissolution of the company, his name had been substituted, without his consent, for that of his wife, in the share register:—*Held*, that he was not a contributory under the act, and his name was, upon motion, ordered to be struck out of the list.

Seem, that liability to creditors of the company is not of itself sufficient to make a person a "contributory" within the act.

April, 1847. In the list then prepared and returned, the name of Mrs. Angas was omitted, and that of Mr. Angas was substituted, without the concurrence or knowledge of either of them.

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All notices in respect of the shares were addressed to Mrs. Angas, and not to Mr. Angas, until 1847.

In 1847 a claim for calls in respect of the shares held by Mrs. Angas was made on Mr. Angas, which he refused to pay. Shortly afterwards, a Mr. Ness proceeded by *scire facias* against Mr. and Mrs. Angas, in the Court of Exchequer, to recover 3000*l.* debt, and 23*l.* 6*s.* 6*d.* costs, recovered by Mr. Ness in an action against one of the public officers of the company. Mr. and Mrs. Angas appeared and pleaded to the *scire facias*, but the matter proceeded no farther. In May, 1847, Mr. Ness issued a writ of *scire facias* against Mr. Angas alone, to recover the amount of the judgment and costs; and he obtained a verdict, at the Summer Assizes, 1847, for Northumberland, for the amount, subject to various points of law reserved at the trial. These points were still pending in the Court of Exchequer, upon a rule nisi granted to the defendant to enter a nonsuit.

Mr. Angas had no shares in his own name; but it was in evidence that he attended the meetings of shareholders, and took part in the proceedings at one such meeting; at which meeting he held a proxy for an absent shareholder, but he never held a proxy for his wife. The Master had settled the list of contributories, including the names of Mrs. Angas and of Mr. Angas without limitation (a).

Mr. *Russell* and Mr. *Terrell* now moved that the decision of the Master might be reversed, and that the name of Mr. Angas might be struck out of the list.

Mrs. Angas's name ought not to be on the list. The company knew that Mrs. Angas was a married woman, and

(a) Vide ante, p. 548.

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they admitted her without any notice to Mr. Angas of any claim upon or liability in him in respect of these shares. Mr. Angas never acted except as agent of Mrs. Angas. The company cannot claim contribution from Mr. Angas. It is a very different question whether Mr. Angas is liable to the creditors of the company.

Mr. Baron, Mr. Lind, and Mr. Hallam, for the official managers of the company.—Mr. Angas's agent to Mrs. Angas purchasing the shares which she could not by law do except as his agent made him a partner. The company knew that Mrs. Angas, as a married woman, could not bind herself and had a right to order that she could hold the shares only as agent for her husband. Under these circumstances the Court will subordinate the shares of Mrs. Angas to the ownership of Mr. Angas.

By clause 11 of the deed of settlement, it is provided that shareholders may vote by proxy, but such proxy must be held by shareholders only: and although it may be contended that when Mr. Angas took part in the proceedings as a meeting of shareholders, he acted only under his proxy, yet Mr. Angas must be taken to have known the provisions of the company's deed, and in his acting under it he was assumed to act and the acts of shareholders that he was himself a shareholder.

THE VICE-CHANCELLOR. —

It has been the duty of a husband living at the time of the purchase of shares which the company knew. The company, as a shareholder in respect of these shares, was not responsible on the part of her husband, and the dividends were afterwards received by him, and he was not guilty of a fraud on his wife, but in every respect as his wife's agent.

I am of opinion, that the evidence adduced in the company's case established that Mr. Angas in respect

of the shares except as regarded the wife; and, as between the company and the husband, he ought not to be held liable.

The question of the husband's liability, or absence of liability, to the creditors of the partnership, is not before me under this act. He may or may not be personally liable to all of them. The question is as to the rights of these persons *inter se*. I must direct the name of Mr. Angas to be struck out of the list; but, as I differ from the Master, whose judgment is of great weight, I cannot give any costs upon this motion (a).

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(a) This case was brought by appeal before the Lord Chancellor, who directed the matter to stand over till the result of the proceedings at law was known. The case has since been argued before the Court of Exchequer on the points reserved, and the rule to enter a nonsuit was made absolute; the Court holding, that Mr. Angas was not liable: *Ness v. Angas*, Exch., May 8, 1849.

HUTCHINSON'S CASE.

Jan. 16th.

THE official managers had placed the name of a Mrs. Hutchinson upon the list of contributories as executrix of Mr. Hutchinson, deceased, and gave her notice that her name had been included in such list, in that character, according to the following provisions of sect. 78 of the Joint-stock Companies Winding-up Act, 1848:—

“And be it enacted, that notice in writing shall be given to every person included in, or proposed to be specially excluded from, the list of contributories, or in any variation therein, or addition thereto, as aforesaid, before the same shall be settled by the Master, thereby notifying that such

purpose of enabling the Master to decide that she was a contributory without qualification; and the Master who had so decided upon such a notice, was directed to review his report. *Quære* whether, in such a case, a new notice can be effectually given.

On a notice to a person that her name was inserted in the list as a contributory in a particular character, she attended before the Master by her solicitor, to oppose the insertion of her name altogether:—*Held*, that she did not thereby waive any objection to the sufficiency of the notice, for the

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person is included in, or excluded from, the list, and if included, then in what character, and for what number of shares, and of what amount, or for what other interest such person is so included; and that if no cause shall be shewn to the contrary, to the satisfaction of the Master, by a day to be fixed by the Master, and to be specified in such notice, the list shall not, as to every person failing or neglecting to shew cause within the time to be so fixed, be afterwards disputed, without leave of the Court first obtained."

Mrs. Hutchinson's solicitor attended before the Master, and insisted that her name ought not to be inserted at all in the list. After hearing the evidence, the Master retained Mrs. Hutchinson's name, and struck out the qualification (a).

Mr. *Russell*, for Mrs. Hutchinson.—It is not competent for the Master, proceeding upon such a notice as had been served on Mrs. Hutchinson, to insert her name on the list as a contributory without qualification. The notice was the intimation of the case of the official managers against this lady, and it could not be extended on the discussion before the Master. It clearly could not have been extended if she had not attended before the Master; and no acquiescence or waiver can be shewn on the part of the solicitor, who appeared for her.

Mr. *Bacon*, Mr. *Lloyd*, and Mr. *Headlam*, for the official managers.—The function of the notice required by sect. 78 is to bring the parties before the Court, and not by the act of a merely ministerial officer, the official manager, to limit the Master's authority to go into the whole case against each contributory who attends before the Master. To hold that it does, may lead to very mischievous results. The attendance of Mrs. Hutchinson's solicitor before the Master left the whole case open as against her.

(a) Vide ante, p. 548.

The VICE-CHANCELLOR said, he could not hold this lady to have waived the objection. Whether its success could be of any advantage to her, was for her consideration. The Master had better be requested to review his report. All parties would then be at liberty to re-argue the matter before him on the merits, and every question would be open.

The order would be analogous to the proceeding where, upon exceptions, the Court neither overruled nor allowed the exceptions, but simply referred it back to the Master to review his report (*a*).

His Honor would not intimate any opinion whether a new notice could or could not be effectually given.

(*a*) See *Glaholme's case*, post, p. 583.

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ARMSTRONG'S CASE.

Jan. 16th.

JAMES HEDLEY, being possessed of eleven shares in the North of England Joint-stock Bank, by his will gave the residue of his personal estate, including these shares, to William Armstrong, (whom he appointed trustee and executor of his will), upon trust, with all convenient speed, after his decease, to sell and convert the same into money, and, after payment of debts, to invest the residue in Government or real securities, and to pay the produce thereof to the testator's sister, for her separate use for life, with trusts over for her children and the children of other persons named.

By the deed of settlement of a banking company, executors of deceased shareholders had the option of becoming shareholders on giving certain notice, or of selling the shares; and, until the option was exercised, the dividends might be retained by the

company, as a guarantee fund. In default of any person executing the deed in respect of such shares, after six months' notice, the shares were liable to forfeiture. A shareholder in the company bequeathed his shares to his executor, in trust to convert them into money. The executor sold some of the shares, but did not give the proper notice to make himself a shareholder as to the rest, and was, nevertheless, permitted to receive the dividends on them for five years, signing the receipts as executor only:—*Held*, that he was not a contributory without qualification.

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The testator died in May, 1844, and Mr. Armstrong proved the will and took on himself the trusts. He received three dividends on the shares which had belonged to the testator, as they became payable, signing receipts for them in his name, with the addition of "Executor of James Hedley." In December, 1845, he transferred five of the shares to a Mr. Bramwell.

The clauses of the deed of settlement applicable to this case were the following:—

"No. 10. It shall not be lawful for two or more individuals to subscribe for or hold jointly, except as trustees, executors, or administrators, any shares in this company; and in no case shall any share be divided into fractional parts.

"No. 12. This clause is fully set out in *Fenwick's case*, ante, p. 558.

"No. 14. Each shareholder shall be entitled to and interested in the profits, and be subject and liable to the losses of the company, in proportion to his shares.

"No. 28. The husband of any female shareholder, or the executor, administrator, or legatee of any deceased shareholder, or the assignee of any bankrupt or insolvent debtor, possessed of shares, shall not be a member of the company in respect of such shares as shall be vested in him in any of the aforesaid capacities respectively, but such assignee of a bankrupt or insolvent debtor shall sell and dispose of such shares in manner and subject to the provisions hereinbefore expressed and contained with respect to the sale and transfer of shares; and any such husband, executor, administrator, or legatee, as aforesaid, shall be at liberty either to sell and dispose of the shares so vested in him, in like manner and subject as aforesaid, or, at his option, to become a member of the company in respect of such shares, on complying with the provisions of these presents, as next hereinafter expressed in that behalf.

“No. 29. The husband of any female shareholder, or the executor, administrator, or legatee of a deceased shareholder, who shall be desirous of becoming a member of the company in respect of the shares vested in him in any of such capacities respectively, shall give notice in writing at the banking-house of the company, in Newcastle-upon-Tyne, of such his desire; in which notice shall be expressed the name and place of abode of the person giving the same, and the name of the shareholder in whose place or right he claims, and the number of shares in respect whereof he is desirous of becoming a member; whereupon, and upon otherwise complying with the provisions of the deed of settlement, he shall be admitted and become a member of the company in respect of such shares, and have the same transferred into his name accordingly, and shall be personally charged with the duties and liabilities incident to the ownership of the same.

“No. 30. The husband of any female shareholder, or the executor, administrator, or legatee of any deceased shareholder, who shall not, under the provision lastly hereinbefore contained, elect to become a member of the company in respect of the shares vested in him in any such capacity, and also the assignee of every bankrupt or insolvent debtor possessing shares, shall be entitled to receive any dividend which shall have become due on the shares so vested in him in any such capacity as aforesaid, before his title to the same shares accrued; but no dividends which shall become due on the same shares after his title shall have accrued, shall be payable to or demandable by him, but shall, till some person shall have become a member of the company in respect of the said shares, remain in suspense, and shall not be paid till the transfer thereof shall be completed, and the new holder thereof shall claim the same; and every transfer shall carry with it the profits and interest, and share of capital and surplus or guarantee fund, in respect of the shares transferred, so as to close all the right and interest of the

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party or parties making such transfer, in respect of such transferred shares.

"No. 31. In case any person in whom any shares shall by original subscription, purchase, marriage, bequest, representation, or other mode of acquisition, become vested, and who shall not have executed the deed of settlement, shall, for six calendar months after notice in writing for that purpose, neglect or refuse to execute the same, it shall be lawful for the directors to declare the shares so vested in such person so neglecting or refusing, and all benefit and advantage whatsoever incident thereto, to be forfeited to the other shareholders, and the same shall be forfeited accordingly."

It had not been the practice of the company, or directors of the bank, to enforce the rules requiring notice to be given by executors of their intention to become shareholders, the usual course having been for the company to be satisfied with the production and registration in their books of the probate of the will of the deceased shareholder, or letters of administration to his estate, together with such evidence as might be sufficient to satisfy the company of the identity of the person filling the office of executor or administrator, and thereupon to pay the dividends to him.

The official manager, in making out the list of contributories, inserted the name of Mr. Armstrong as a contributory for six shares, without qualification.

It was in evidence before the Master, that a Mr. Ness had obtained judgment against the company for 3000*l.*, and was proceeding by *scire facias* to enforce the judgment against Mr. Armstrong; and it appeared, that, upon such proceeding, the question was pending before the Court of Exchequer, whether Mr. Armstrong was a member liable generally to a creditor of the company, or whether he was a member liable only as executor.

The Master retained the name of Mr. Armstrong in the list, without qualification (*a*).

Mr. *Russell* and Mr. *Piggott* moved, on behalf of Mr. Armstrong, that the decision of the Master might be revised, and that Mr. Armstrong's name might be struck out of the list of the contributories of the company.

Mr. Armstrong's name ought not to be inserted in the list as a contributory without qualification. He is neither a "member" nor "contributory" under the interpretation contained in section 3 (*b*) of the act.

The testator in this case had died more than three years before the bank stopped payment, and the liability of his estate to the creditors of the bank is regulated by the 13th section of the 7 Geo. 4, c. 46, which limits the liability of the shareholders to three years after they have ceased to be such; (see the section at length, post, 572). Under such circumstances, in a suit for the administration of his estate, creditors of the bank at the testator's death would not come within the scope of the decree (*c*).

By reason of clauses Nos. 28, 29, 30, and 31 (*d*), of the deed of settlement, Mr. Armstrong could not become a partner, at all events as between himself and the other shareholders, except by adopting a certain defined course, which has not been taken.

Mr. *Bacon*, Mr. *Lloyd*, and Mr. *Headlam*, for the official manager, in support of the Master's decision.—Reading clauses of the deed of settlement, Nos. 10, 12, and 14 (*e*), and having regard to the fact that practically an executor has always been admitted a member, on his shewing

(*a*) Vide ante, p. 548.

(*b*) Vide ante, p. 554, n. (*a*). 568.

(*c*) *Barker v. Buttreass*, 7 Beav.

(*d*) Vide ante, pp. 566, 567,

(*e*) Vide ante, p. 566.

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his title, it must be considered that this executor was in effect admitted a shareholder, and received dividends. He cannot be heard to say that he continued to hold contrary to the direction of the trusts of the will, and was not a shareholder for the purpose of this argument, whatever may be his situation with regard to the persons beneficially interested under those trusts.

Whatever may be the effect of the clauses of the deed of settlement, they are subject to the general principle, that whoever receives any portion of the profits of a company, is a partner.

The VICE-CHANCELLOR:—

Mr. Armstrong has done many acts as an executor, and none as in his own right. I consider the question to be, not whether Mr. Armstrong is personally and individually liable to the creditors of the partnership company. That question is not before me in any manner, nor will it be affected by what the Master has done, or by what is to be done by me. Mr. Armstrong may be liable personally and individually to creditors, or he may be liable only as executor: as to that I decide nothing. The question before me is, what is Mr. Armstrong's position, as between himself and the company? I think the evidence not sufficient to shew that he was, or has become, liable, otherwise than as executor. It seems to have been assumed that it was for the benefit of the company that he should be individually retained, rather than as executor. How that may be, I do not know. Looking at the provisions of the deed, looking at the whole course of proceedings, and at the manner in which the receipts were signed, I cannot think him personally liable.

I agree that the parties intending to waive the formalities of the deed of settlement, might have waived them; but it

is not proved that they intended to waive them. I think it should be referred back to the Master, to review his decision (a).

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(a) An appeal from this decision to the Lord Chancellor has been heard, and ordered to stand

over until the result of the proceedings at law is known.

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HAWTHORN'S CASE.

Jan. 16th.

ON the 2nd of January, 1847, Mr. Robert Hawthorn, then the holder of eighteen shares in the North of England Joint-stock Banking Company, effectually transferred them to John Cowens, and thenceforth Robert Hawthorn's name was not returned to the Stamp Office.

The official managers, one of whom was a continuing shareholder in the company, summoned Mr. Hawthorn to shew cause why his name should not be on the list, under the 81st section of the act, which provides that it shall be lawful for any person whose name shall stand upon the list of contributors to summon any person whose name shall not be upon such list, and who shall not have been previously specially excluded therefrom, to appear before the Master at a day and time to be therein specified, to shew cause why his name should not be included in, or should be specially excluded from, the list; and that, upon the return of such summons, or at any future time, to be fixed by the Master, he shall consider the liability or alleged liability, or right of the party so summoned, to be inserted in such list, and shall, by writing under his hand, declare whether such party should or should not be included in, or excluded from, the list.

A., a shareholder in a joint-stock banking company, established under the 7 Geo. 4, c. 46, effectually assigned his shares in the company more than three years prior to the winding-up of such company, under 11 & 12 Vict. c. 45. It appeared that there was at least one other former shareholder in the same situation:—*Held*, that A. had been properly included in the list of contributories, and that it was no objection that his name had been placed on the list upon notice given by a continuing shareholder.

Held, also, that, if the certificate of the decision given out by the Master to the party appealing differ from the statement on the file of the proceedings, the latter is to be assumed to be the actual decision.

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The Master, after hearing the parties, settled the list of contributories, including the name of Mr. Robert Hawthorn as a contributory in respect of eighteen shares, and, as such, liable to debts, liabilities, and losses of the company up to the 1st of January, 1847 (*a*).

It appeared that there was at least one other former shareholder, who had ceased to hold shares at a period anterior to January, 1847. The name of this other shareholder was William Hawthorn.

Mr. *Russell* and Mr. *Bates* now moved, on behalf of Mr. Robert Hawthorn, that his name might be struck out of the list of contributories.

There are three different classes of companies to which the provisions of the Winding-up Act apply.

First, companies formed under, and regulated by, the stat. 7 Geo. 4, c. 46.

Secondly, companies under the stat. 7 & 8 Vict. c. 110.

Thirdly, companies under the stat. 7 & 8 Vict. c. 113.

It is admitted that this company belongs exclusively to the first class, and for the purposes of this motion it becomes necessary to consider how the act of 7 Geo. 4, c. 46, regulates the liabilities of the company between a creditor and a shareholder who has ceased, but for a shorter period than three years, to be a shareholder, and all the continuing shareholders.

By the 7 Geo. 4, c. 46, s. 13, it is enacted, "that execution upon any judgment in any action obtained against any public officer for the time being of any such corporation or co-partnership, carrying on the business of banking under the provisions of this act, whether as plaintiff or defendant, may be issued against any member or members for the time being of such corporation or co-partnership; and that in case any such execution against any member or members for the time being of any such corporation or co-partnership shall

(*a*) Vide ante, p. 549.

be ineffectual for obtaining payment and satisfaction of the amount of such judgment, it shall be lawful for the party or parties so having obtained judgment against such public officer for the time being to issue execution against any person or persons who was or were a member or members of such corporation or co-partnership at the time when the contract or contracts, or engagement or engagements, in which such judgment may have been obtained, was or were entered into, or became a member at any time before such contracts or engagements were executed, or was a member at the time of the judgment obtained. Provided always, that no such execution as last mentioned shall be issued without leave first granted, on motion in open court, by the Court in which such judgment shall have been obtained, and which motion shall be made on notice to the person or persons sought to be charged, *nor after the expiration of three years next after* any such person or persons shall have ceased to be a member or members of such corporation or co-partnership."

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Under this clause it is clear that the existing shareholders are primarily liable, and that creditors are bound to exhaust their remedies against all the existing shareholders before they can proceed, in any case, against a shareholder who has retired for three years; and the Courts have so decided: *Steward v. Dunn (a)*, *Barker v. Buttress (b)*, *Eardley v. Law (c)*.

It follows that in this company—

First, the funds of the company are liable to all the creditors.

Secondly, all existing shareholders are liable to all the creditors.

And Thirdly, the retired shareholders are liable only to the extent of making good deficiencies in respect of debts subsisting at the time of their retirement.

(a) 12 M. & W. 655. (b) 7 Beav. 134. (c) 12 Ad. & E. 902.

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Now, the object of the Winding-up Act is, to provide for the payment of the debts, and winding up the affairs of the company, for the benefit and protection of the shareholders *inter se*, and not for the benefit of the creditors. Mr. Robert Hawthorn ought not, therefore, to be placed on the list of contributories until the funds of the company, and all the means of all the present shareholders, are exhausted.

It is a further objection to Mr. Robert Hawthorn's name remaining on the list, that it is placed there on the application of the official managers, one of whom, Mr. Robson, is a present shareholder in the company, and whose name is upon the Master's list as a contributory without limitation. He is bound to hold Mr. Robert Hawthorn harmless, and he at least has no rights in respect of which he can claim to have Mr. Robert Hawthorn's name placed upon the list. By the consent of the directors, which, for this purpose, binds Mr. Robson, Mr. Cowans purchased Mr. Robert Hawthorn's shares, and became liable in his place in respect of those shares. Upon what equity, then, can Mr. Robson ask to have Mr. Robert Hawthorn's liability in addition to Mr. Cowans'? Mr. Cowans' liability extends to every debt, he has not denied his liability, and the time given to him to move to have his name erased from the list of contributories has expired.

The obligation on the transferee of the shares, to discharge all the liabilities relating to them, was one of the considerations in fixing their price, and the transfer throws a share of all the obligations, as well as of all the funds of the company, on Mr. Cowans.

Mr. Robert Hawthorn's name is proposed to be retained, under sect. 81 of the Winding-up Act (a). The payment of liabilities is one object of this act, but the balance of the funds is then to be divided rateably. It is not alleged that Mr. Robert Hawthorn can have any interest in this balance.

(a) Vide ante, p. 571.

There is a discrepancy between the list as settled by the Master, and the certificate of the Master's finding, as given out to Mr. Hawthorn. Upon this motion the Master's certificate is the only evidence of what he has done.

Again, Mr. Hawthorn ought not to be on the list; because, if he is liable as a contributory at all, it is in a way not provided for by the act. To ascertain Mr. Hawthorn's liability, or to charge him with any liability, it is necessary to make a rest, and determine what were the liabilities subsisting on the 1st of January, 1847, when Mr. Hawthorn ceased to be a shareholder; and inasmuch as the act provides no machinery for doing this, there is no object for which his name should be on the list.

Mr. Bacon, Mr. Lloyd, and Mr. Headlam, for the official manager, were not called on by the Court.

The VICE-CHANCELLOR:—

It appears to me, that, upon the present application, I ought not to consider as material the difference, if there is any solid difference, between the certificate which the Master has delivered out, at Mr. Hawthorn's request, and the authenticated list, approved and settled by the Master, which is before me. It seems to me, that, for all present purposes, I ought to consider the certificate as good for nothing, so far as it differs, if it substantially differs, from the list (a).

The next consideration is this, whether, as Mr. Hawthorn was brought before the Master, under the 81st section of the act of 1848, by Mr. Robson, who is at present a shareholder in the company, Mr. Hawthorn is improperly in the Master's list, on the assumption, that, as between Mr. Robson and Mr. Hawthorn, Mr. Robson is solely liable. I think that it is not necessary to give any opinion upon the question,

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(a) See the Winding-up Act, 1848, s. 99.

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whether, as between these two, Mr. Robson is solely liable. I am, however, of opinion, that Mr. Hawthorn is not improperly on the list, merely by reason that it was Mr. Robson who was the means of bringing him there, under the 81st section.

The main question is, whether this gentleman, Mr. Hawthorn, is a contributory within the definition of that word in the 3rd section of the act of 1848, which says, that the word "contributory" shall include every member of a company, and also every other person liable to contribute to the payment of any of the debts, liabilities, or losses thereof, whether as heir, devisee, executor, or administrator of a deceased member, or as a former member of the same company, or otherwise howsoever.

The arguments that have been addressed to me have avoided the consideration of the position, as between themselves, of the various persons who are in Mr. Robert Hawthorn's situation. It is possible that there are many such; it is clear that there is one, namely, Mr. William Hawthorn: and one raises the question. Now, as between William Hawthorn and Mr. Robert Hawthorn, and also as between him and other persons in the same position, there must be a liability to contribute, because a case may arise of a deficiency on the part of the persons liable before them, capable of leading to the necessity of proceeding against one of those. Clearly, therefore, as between them, there must be contribution, or a right of contribution, or a power of enforcing contribution, and therefore liability. Now, what the Master has done, is not, as I understand it, to decide the order and course of liability between the several persons who may be liable: that arrangement is to take place hereafter; for by the 83rd section it is enacted, "that, at any time before the whole of the assets of such company shall have been collected or converted, and if the assets remaining to be collected or converted shall not be capable of being immediately realised, although such assets may not appear to be

sufficient, and also after the assets of the company shall have been wholly exhausted, it shall be lawful for the Master, from time to time, to make calls on the contributories, or on such individual contributories, or classes of contributories, as he may think proper, but so far only as such contributories, respectively, shall be liable, at law or in equity, to pay the same, as well for raising such amount as may be necessary to pay the debts or liabilities of such company, or any part thereof, or the costs, charges, and expenses of winding up the same, as also for the purpose of adjusting and settling the respective claims of contributories upon each other, or upon the company, whether such claims shall have arisen since or before the date of the petition for dissolution and winding up, or for winding up, as the case may be; and the amount to be raised by means of such calls, and also the residue of assets and estate of the company, after the payment of all debts and liabilities, costs, charges, and expenses, shall be paid and distributed by the official manager, under the directions of the Master, so and in such manner as shall, as far as possible, satisfy all such claims, and shall finally wind up and settle the affairs of the company."

Now, the Master having found Robert Hawthorn liable to all losses, if any, up to the 1st of January, 1847, inclusive, I am of opinion that there may be and are a sense in which, and a purpose for which, that proposition is true. I am of opinion that the proposition does not involve the decision of *par jus* between all the persons bound by it; but the order in which the liability is to be enforced, is a matter to be decided hereafter, according to the rights of the parties. I think it better not to add to the order refusing the motion, a declaration that it is without prejudice to any question as to the order of liability: these words are unnecessary, and may be dangerous; but it must be understood, that the circumstance of Mr. Hawthorn being in the list, does not import at all that there may not be other persons

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Mr. Hawthorn appealed from the decision to the Lord
 Jan. 30th. Chancellor, but the appeal was dismissed, with costs (a).

(a) 1 M'N. & G. 49. The reasoning adopted in this and the other cases above reported, was lately applied, in a case of the Liverpool Timber Company, before Master Senior, to the question of the liability of the holders of forfeited shares to be placed upon the list of contributories. In support of the application of the official manager to place them upon the list, it was contended, that, as the forfeiture did not exempt the shareholder from liability to creditors, it could not be a ground for excluding him altogether from the list of contributories, whatever might be the order or extent of his liability to contribute. The Master reserved his decision on this general question, (which, it appeared, had not previously been raised in any case), that it might be considered by the Masters, and a uniform course taken with respect to it.

On a subsequent day, he stated, that there was a difference of opinion among the Masters, but that the majority of those who had

been consulted agreed with him, in thinking that a declaration of forfeiture might, under proper circumstances, be a ground for exclusion from the list. The Master decided accordingly. Other points were then raised, as to the validity of the declaration of forfeiture, which was impugned on the grounds that it was not declared at a meeting of directors properly summoned for that purpose, and that the proper notice of it had not been given to the holders of the shares declared to be forfeited. It was also contended, that the forfeiture did not, according to the deed of settlement, or the general law, exempt the shareholders from contributing in respect of the calls then in arrear. These arguments were, however, held invalid; and the Master decided in favour of the parties who objected to be placed upon the list. The case was argued by Mr. Follett, Mr. J. Bailly, Mr. De Gex, and Mr. J. V. Prior, for the several parties.

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THOMAS'S CASE.

March 15th.

JOHN NESS was, at the time of his death, the holder of forty-eight shares in the North of England Joint-stock Banking Company, having executed the deed of settlement of the company in respect of forty of such shares, and the remaining eight having been subsequently allotted to and accepted by him. He received the dividends on all the forty-eight shares as they became payable.

In January, 1847, he made his will, which was proved in April, 1847, by Miss Thomas, the executrix.

Miss Thomas never claimed, either as executrix or otherwise, to become a shareholder or member of the company, nor did she ever receive any dividends, but always repudiated the profits, liabilities, and engagements of the company.

According to her affidavit, in the Master's office, the testator's personal estate did not amount to 20*l.*, and had been altogether exhausted in the payment of his debts.

The official manager inserted the name of Miss Thomas in the list of contributories, as executrix of John Ness, and gave her notice thereof; but in such notice he omitted to state that her name had been inserted with such qualification.

The Master, in settling the list, retained the name of Miss Thomas therein, as executrix of John Ness (*a*).

Mr. *Russell* and Mr. *Stevens*, for Miss Thomas, in support of a motion that her name might be struck out of the list of contributories of the company.—The constitution of this company, and the liabilities in respect of it, are regulated by the deed of settlement, according to which the name of Miss Thomas ought not to be on the list. Mr.

A testator was a shareholder in a joint-stock banking company, which was established under the provisions of the 7 Geo. 4, c. 46; and, according to the deed of settlement of which, personal representatives of deceased shareholders might become shareholders, on giving certain notices. The executrix never gave the prescribed notices, but repudiated all interest in the concerns of the company. By her affidavit, in the course of the proceedings under the Wind-up Act, 1848, she deposed that the testator's assets were under 20*l.*, and had been all exhausted in payment of debts:—*Held*, that her name had been properly placed upon the list of contributories, as executrix.

(*a*) Vide ante, p. 548.

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Ness, by his death, ceased to be a shareholder in the company; and the deed of settlement, clause No. 28 (a), provides that some preliminary steps must be taken before his interest could be taken up, either by his personal representative or by a purchaser. The executrix here has repudiated all interest, and has never fulfilled the requisite preliminary conditions for constituting her a contributory, within the meaning of the act.

Besides, it is sworn that all the assets of the testator have been administered, and there is nothing in respect of which Miss Thomas, in her representative character, can be a contributory.

If it be contended that there may be assets, the answer is, that testator's estate cannot be administered under the provisions of the act, but that any claim against that estate must be enforced by the ordinary forms of procedure.

They also objected, that the notice served on Miss Thomas, whereby her name was proposed by the official manager to be placed on the list of contributories, did not state in what character her name was proposed to be so placed, and that this was expressly required by sect. 78 (b) of the act; but they afterwards waived this objection.

The VICE-CHANCELLOR abstained from giving any opinion upon the objection which had been waived; but it having been waived, his Honor thought and decided, that Miss Thomas's name was properly retained on the list, in her representative character.

(a) Vide ante, p. 566.

(b) Vide ante, p. 563.

1849.

CHARTRES' CASE.

Jan. 17th.

MISS HOWE CHARTRES had been prior to, and was in the year 1847, a shareholder in the North of England Joint-stock Banking Company in respect of six shares. In January, 1847, she sold those shares to one William Henry Stafford (who had been previously a shareholder in the same company) at the price of 2*l.* 10*s.* per share.

On the 3rd of January, 1847, Miss Chartres, in conformity with the provisions of the company's deed of settlement, offered the shares at that price to the directors.

By another notice shortly afterwards, containing such particulars as were required by the provisions of the deed of settlement, and in the form prescribed by the directors, and duly signed by her, she gave notice that she had sold the shares to Mr. Stafford, and required the consent of the directors to the sale.

Two boards of the directors were subsequently held, and no answer was given to either notice. An agent for Miss Chartres then inquired of one of the managing directors of the company, why no answer had been given to her notice; and the director in reply stated, that there had not been time to discuss the matter of transfers, and a promise was made that the consent of the directors to the transfer should pass the next board.

Some inquiries were made as to Mr. Stafford, and on the 6th of March, 1847, when the bank stopped payment, Miss Chartres' name remained on the list as a shareholder.

The Master, in settling the list of contributories, retained upon it the name of Miss Chartres without qualification (*a*).

Mr. *Russell*, in support of a motion that the name of Miss Chartres might be struck out of the list.—By the

Where a shareholder in a company had taken all the proper steps within her power to assign her share, but the directors omitted to assent to, or dissent from, the sale, for a period exceeding two months, and until the company stopped payment —*Held*, that, nevertheless, the name of such shareholder had been properly placed upon the list of contributories without qualification.

(*a*) Vide ante, p. 548.

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terms of the deed of settlement of the company, the directors had the option of purchasing these shares. Miss Chartres properly gave them that option. She then gave them notice of her having sold the shares, and required their consent to the sale. The directors were bound to take one of two courses—either to have bought, or to have sanctioned the transfer of the shares: they did neither; this was gross negligence, amounting to evidence of fraudulent intention on their part, for which this lady ought not to suffer.

Mr. *Bacon*, Mr. *Lloyd*, and Mr. *Headlam*, for the official manager, were not called on by the Court.

The VICE-CHANCELLOR said, a fraudulent intention was not alleged. It was said the negligence was so great as of itself to amount to evidence of fraudulent intention, but it did not appear to him to be so.

There might have been some degree of inattention; the matter might not have been considered and disposed of as soon as it might have been—a circumstance probably to be accounted for by the difficulties of the company; the case might have some hardship about it, but there had not been enough to discharge this lady.

The motion was dismissed, but without costs.

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GLAHOLME'S CASE.

Jan. 13th.

WILLIAM GLAHOLME was, up to and at the time of his death, the registered owner of six shares in the North of England Joint-stock Banking Company. He died in 1837, intestate.

Shortly after his death, his brother, Thomas Glaholme, applied to the company for the dividends due on the shares; and upon his representation that those shares constituted all the assets of the intestate, the company paid the dividends to him from time to time, up to the last division of declared profits prior to the bank's stopping payment; and he always signed the receipts for dividends thus: "Thomas Glaholme, representative of William Glaholme, deceased;" but in fact he never obtained administration to his brother's estate, nor were the shares transferred into his name, and he was not among those returned to the Stamp Office as proprietors.

The official manager inserted the name of Mr. Thomas Glaholme in the list of contributories carried in by him before the Master, as a contributory for six shares as "representative of William Glaholme," and gave him notice that his name was inserted with that qualification in respect of the shares.

Mr. Thomas Glaholme appeared before the Master, and contended, that his name ought not to be inserted in the list of contributories at all; and that, at all events, as he had appeared in pursuance of a notice of the insertion of his name with a qualification, it was not competent for the Master, upon such notice, to insert his name without qualification.

The Master, however, settled the list, including the name of Mr. Thomas Glaholme therein without qualification (a).

The brother of a shareholder who died intestate, was allowed by the company to receive dividends on the intestate's shares, without administering to his estate, on his signing receipts as representative of the intestate:—*Held*, that it was not competent for the Master, upon a notice to the brother, that his name was intended to be inserted on the list of contributories in his representative character, to insert his name as a contributory without qualification.

(a) Vide ante, p. 548.

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It was now moved, on the part of Mr. Thomas Glaholme, that his name might be struck out of the list of contributories.

Mr. *Russell* and Mr. *Manisty*, in support of the motion, took the objection with regard to the notice.

Mr. *Bacon*, Mr. *Lloyd*, and Mr. *Headlam*, for the official manager.—Mr. Glaholme having been brought into the Master's office upon an accurate notice, the requisition of the act has been complied with, and the Master has jurisdiction, upon the evidence, to amend the list by leaving Mr. Glaholme's name on it without qualification.

The VICE-CHANCELLOR allowed the objection, and referred it back to the Master to review his decision (*a*).

The official managers appealed from his Honor's judgment; but, on the 18th of January, 1849, the Lord Chancellor dismissed the appeal, with costs (*b*).

(*a*) See *Hutchinson's case*, ante, p. 568.

(*b*) 1 H. & T. 123.

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Dec. 8th.

Ex parte WALKER and *Ex parte* TROUTBECK, In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP ACT, 1848, and In the Matter of THE MARYLEBONE JOINT-STOCK BANKING COMPANY.

THESE were two petitions, praying that the affairs of the Marylebone Joint-stock Banking Company might be wound up, under the 11 & 12 Vict. c. 45.

The company was constituted by a deed of settlement, of the 31st of August, 1836.

One of the petitions was that of Edmund Walker, one of the directors, who, by his affidavit, deposed that he was one of the persons parties to the deed of settlement, and was the registered proprietor and holder of 150 shares in the company.

In exercise of the powers given by the deed of settlement, the directors of the company had taken premises in Cavendish-square, and in Bucklersbury and Finsbury, and also at Reading, and they there commenced and carried on the business of bankers. On the 25th of October, 1836, the petitioner, Edmund Walker, was elected one of the directors.

In the year 1841 the affairs of the company became embarrassed, and difficulties arose in obtaining from the shareholders the contributions which became necessary to meet the liabilities of the company and to pay its debts.

In 1842 a bill was filed by certain shareholders, on behalf of themselves and all other shareholders in the company, against the petitioner, Edmund Walker, and other directors, praying (among other things) that an account might be taken of all sums of money received by the directors, or by their order, or for their use or benefit, on account of the company, or which, but for their wilful default or neglect, might have been or ought to have been so received; and an account of all sums of money properly expended by the directors, or any or either of them, or by any person or persons by their or any or either of their direction or authority,

It is not a sufficient objection to a petition for winding up the affairs of a company, under 11 & 12 Vict. c. 45, that there are no debts due from the company, or that the petitioner is one of the directors against whom a suit in Chancery is pending, seeking to make them personally liable to the shareholders for the losses of the company.

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in respect or on account of the company; and an account of all bills discounted, and of all advances of money by the company, on which any losses had been sustained by the company, with all the particulars relating thereto; and, in particular, of all such bills discounted for and advances made to the respective directors of the company, and to their or any or either of their relations and friends, and on what, if any, security or securities; and that the Master might inquire and state what loss or losses had been sustained by the company in respect or by reason of such last-mentioned bills discounted and advances; and that the Master might take an account of all losses sustained by the company since the 5th September, 1836; and that the Master might inquire into and state the particulars of such losses, and all special circumstances relating thereto; and that the directors who were defendants to the bill might be declared personally liable to make good all that might be found due to, and the losses sustained by, the company, in taking the accounts and making the inquiries aforesaid; and that what should be so found due from the defendants might be ordered to be paid and applied for the benefit of the shareholders, in such manner as the Court should think fit; and that, in the meantime, the defendants, the directors of the company, might be restrained by injunction from suing for at law or otherwise, and from collecting, and from taking any proceedings at law or otherwise in order to collect, receive, or get in the assets of the company; and for a receiver. But the bill, as amended after a demurrer (*a*) had been allowed, did not pray for a dissolution of the company, nor did it seek to compel the general body of shareholders to contribute to the payment of the debts, liabilities, and losses of the company.

The petitioner, Edmund Walker, had put his answer to the bill, but the suit had not come to a hearing.

(*a*) See the argument on the demurrer, *Deeks v. Stanhope*, 14 Sim. 57.

The petitioner's affidavit stated, that all the several business premises and offices of the company had, for several years, been disposed of or given up, and there was now no office of the company, nor any officer or servant remaining in their employ; and that the petitioner had been called upon by creditors of the company to pay, and had actually paid, divers large sums of money, in respect of the debts and liabilities of the company, far exceeding the petitioner's just contribution in proportion to the number of shares held by him in the company.

The other petition was that of shareholders, also praying that the affairs of the company might be wound up; but the discussion took place upon the petition of Mr. Walker.

Mr. Bacon, Mr. Lloyd, and Mr. Hetherington, supported the petition.

Mr. Cole, for one of the directors, who was served with the petition, consented.

Mr. Glasse, for the plaintiffs in the suit, who had not been served with the petition.—The petition makes no case for the application of the act, for it does not state, nor is it the fact, that there are any unpaid creditors, or that the company cannot go on.

Moreover, it is not competent for this petitioner, during the pendency of a suit—instituted for the purpose of making him and the other directors personally liable—to interrupt the shareholders' relief under their bill, by having the affairs of the company wound up by a different proceeding. It would be impracticable, indeed, to adjust the affairs of the company without ascertaining the extent to which the petitioner and the other directors are liable to make good personally the losses which have been sustained; and this can only be effectually investigated, ascertained, and determined in the suit.

Mr. Bacon, in reply, was stopped by the Court.

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The VICE-CHANCELLOR said, that the pendency of a suit against a party would not invalidate a fiat in bankruptcy issued against him on his own petition. Nor, having regard to the provisions of the act, including the 58th section, which provides that the proceedings under the act shall not affect pending suits, did his Honor think that either of the grounds relied upon formed a sufficient objection to the prayer of the petition.

One order for winding up the company was made on both petitions, and was afterwards affirmed on appeal by the Lord Chancellor (*a*).

(*a*) See 1 H. & T. 100.

Dec. 15th. *Ex parte* BURGE, In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP ACT, 1848, and In the Matter of THE HERNE BAY PIER COMPANY.

A pier company, incorporated by act of Parliament, with power to levy tolls for the use of the pier, (including its use as a promenade), to erect baths, quays, wharfs, and ware-houses—*Held*, not so clearly a trading or commercial company, as to be within the Joint-stock Companies Winding-up Act 1848, which ought only to be applied in plain cases.

THIS was the petition of a “contributory” to the Herne Bay Company, to have its affairs wound up under the provisions of the Joint-stock Companies Winding-up Act, 1848.

The company was incorporated by the provisions of an act of Parliament, 1 Will. 4, c. xxv, intituled “An Act for making and maintaining a pier or jetty and other works at Herne Bay, in the parish of Herne, in the county of Kent,” by the name of “The Herne Bay Pier Company;” and they were thereby authorised to erect and make at Herne Bay a pier or jetty, to extend into the sea, and to be used for the embarking and disembarking, landing and shipping of passengers, and of horses and other live stock, and lading and unlading ships and vessels, in such manner, and subject to such orders and directions, as the directors

Quere, whether a case at law can be directed to determine if a company is within the act.

of the company should deem necessary or expedient, subject to the provisions of the act; and also to erect and make such landing places, quays, wharfs, warehouses, buildings, groins, sea walls, embankments, breakwaters, and other works, and to put down from time to time, and remove, as occasion should require, such buoys, mooring chains, and other matters and things as the directors should think necessary and proper for rendering the same pier or jetty useful and convenient for the landing and embarking of passengers and goods; and also to make a parade along the shore of the bay, and causeways, avenues, and approaches to the pier or jetty, and other works; to erect and make proper and convenient toll-gates, and houses for the collectors of the tolls to be taken under the authority of the act, upon or near to the pier or jetty; and also to erect such proper and convenient baths, bathing places, and accommodations for bathing machines, and such other erections, buildings, and accommodations upon or in the vicinity of the pier, causeway, or approaches, as the directors should from time to time deem necessary or expedient; and also to divert and convey into the sea, as far as low-water mark, such drains, sluices, and watercourses as the directors should think necessary or proper for the security, preservation, and cleanliness of the pier, avenues, approaches, or other works. And provision was thereby made for the keeping the pier in repair, and lighting the same at the company's expense. And it was enacted, that from and after the time that the pier should be so far formed that ships or vessels might be enabled to lade or unlade, take on board, discharge, or put on shore, any goods, wares, or merchandise, at or from the same, the rates or duties mentioned in the schedule to the act should become payable, and be paid to the company, with provision for the payment thereof by the masters of vessels embarking or disembarking passengers, lading or unlading, taking on board, or discharging on the pier, goods, wares, or merchandise. And it was enacted, that,

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from the time the pier should be so far formed that passengers might be enabled to embark or land from or at the same, every passenger who should land from, or embark in any ship, packet, vessel, boat, or other craft, and every person who might land at, or embark from the pier, and every person who should walk on the pier, or the approaches thereto, or on the parade, should pay to the company, in respect of every such landing or embarkation, and of every time of entering or coming upon the pier, or the approaches thereto, or on the parade, such sum or sums as the directors should determine, not exceeding the sums mentioned in the first schedule to the act.

By another act, 6 & 7 Will. 4, c. cxii, enlarging the powers and provisions of the former act, it was enacted, that it should be lawful for the company to complete the pier, extend the head thereof as they should deem expedient, and to proceed to complete the parade, in such manner as the company should deem expedient, so that such parade, sea wall, landing places, jetties, quays, wharfs, warehouses, buildings, and other works, should not extend beyond certain limits.

The petition, and the affidavit in support of it, stated that the company had, under the powers of the acts, executed the greater portion of the works thereby authorised, but had not completed the extension of the head of the pier; that the pier was, however, sufficiently completed for the purpose of traffic in the year 1832, and had ever since been open for the use of passengers, the landing and embarkation of goods, cattle, and other live stock, and the general purposes of the undertaking; and that tolls had, ever since such opening, been taken by the company, as well for such use thereof by passengers as aforesaid, as for such landing and embarkation, and other general purposes.

That the company had, from the time of the original opening of the pier, exercised the trade of wharfingers, and that the undertaking still continued to be open for such purposes,

and that tolls continued to be taken; but that such tolls were, and had for some time past, been of small and inadequate amount only, and that the whole undertaking has proved extremely unprofitable, and that great loss had been incurred in its result by the contributors to the undertaking; that though two dividends of three per cent. each, in the years 1842 and 1843, were respectively declared by the directors, in respect of the profits of the undertaking, yet such two dividends had been the only dividends which, throughout the whole period from the original projection of the undertaking, in the year 1831 as aforesaid, had ever been declared, and the undertaking was wholly unequal to the discharge of the liabilities thereof out of the returns.

That the greater part of the original capital of 50,000*l.* was raised towards defraying the expenditure incurred in the works, but that the whole number of 1000 shares were not paid up as originally taken; and that, at the time of the general meeting of the company, held in the month of May, 1837, there being in the hands of the directors 234 of the shares, that the directors were, by a resolution of the meeting, authorised to issue such shares at a discount of fifty per cent., a portion of which was issued accordingly; that, at the general meeting of the company, held in the month of May, 1838, the directors reported, as the fact was, that there were still undisposed of 106 shares of the original stock; and that it appeared, by a statement laid before the directors, before the general meeting of the company, held in the month of May, 1840, as the fact was, that the total number of shares issued were then only 913, but that the petitioner had no knowledge as to the disposal of the remaining eighty-seven shares.

That, in order to meet the debts of the company, a resolution was passed at a special meeting of the company, held in the month of October, 1841, to authorise the directors to issue, and they accordingly issued, in part of the

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sum of 20,000*l.* additional capital, by the latter of their acts authorised to be raised, 500 new shares of the nominal value of 50*l.* each, but at a discount of seventy per cent., making the amount payable upon each share 15*l.*, and such amount was paid accordingly.

That, in addition to the sums so raised as aforesaid, the company had applied a considerable portion of the returns from the tolls in payment of their expenses, but that the expenditure of the company had considerably exceeded the whole of the sums so raised and applied.

That the petitioner had been a director, but went out of office in the month of June, 1843, since which time he had wholly ceased to be a director.

The petition then proceeded to set out various debts and liabilities to which the company was subject, amounting to 7500*l.*, and stated, that one of the creditors had filed an affidavit of debt, issued a summons, and served a notice upon the company, under the provisions of the 7 & 8 Vict. c. 111; and that the company had not paid, secured, or compounded for the debt, and had by such omission committed an act of bankruptcy.

That the tolls constituted the only resources of the company for payment of its debts, other than the contributions of the shareholders, and were wholly unequal to keeping up the undertaking and discharging the liabilities of the company, but that the directors had all the books in their possession, and that the petitioner was, consequently, unable to state more accurately the pecuniary position and prospects of the company.

That the company was a joint-stock company, established for commercial purposes of profit, within the 7 & 8 Vict. c. 110, 7 & 8 Vict. c. 111, and the Winding-up Act, 1848; that its capital was divided into shares, transferable without the express consent of all the co-partners, and the company, at the time of its establishment, and had ever since, consisted of more than twenty-five members; and that it

was duly registered, under the provisions of the 7 & 8 Vict. c. 110, and obtained a certificate of registration.

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Mr. *Swanston* and Mr. *Goodeve*, in support of the petition.
—There are two descriptions (a) of companies made liable

(a) 11 & 12 Vict. c. 45, s. 1, (*Winding-up Act*, 1848).—This act shall apply to all companies, corporate or unincorporate, within the provisions of either of the two acts first hereinbefore mentioned [viz. the 7 & 8 Vict. c. 111, and 8 & 9 Vict. c. 98, the latter of which applies to Ireland only], (including all companies existing on the 1st day of November, 1844, and which shall have obtained, or shall obtain, a certificate of registration under an act passed in the 7th and 8th years of the reign of her present Majesty, intituled, “An Act for the registration, incorporation, and regulation of joint-stock companies”); and to all companies which would have been within the provisions of either of the said two acts, if they had not been dissolved, or had not ceased to trade at the time of the passing thereof respectively; and to all banking companies which would have been within the provisions thereof, if they had not been specially excepted from the provisions of an act passed in the session of Parliament held in the 7th and 8th years of the reign of her present Majesty, intituled, “An Act for the registration, incorporation, and regulation of joint-stock companies;” and to all companies which, under the provisions of

the said act to facilitate the dissolution of certain railway companies, shall, before the 1st day of March, 1848, have become bankrupt; and to all companies, associations, and partnerships, to be formed after the passing of this act, whereof the capital or the profits is or are divided, or to be divided into shares, and such shares transferable without the express consent of all the copartners.

The following are the enactments on which the argument turned :—

7 & 8 Vict. c. 111, s. 1.—Whereas it is expedient to extend the remedies of creditors against the property of such joint-stock companies or bodies as hereinafter mentioned, when unable to meet their pecuniary engagements, and to facilitate the winding up of their concerns, and it may be also for the benefit of the public, to make a better provision for discovery of the abuses that may have attended the formation or management of the affairs of any such companies or bodies, and for ascertaining the causes of their failure: Be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and the Commons in this present Parliament assembled, and by the authority of the

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to the provisions of the Winding-up Act, 1848, within either of which the present company may be considered as falling.

same, that if any commercial or trading company, now, or at any time hereafter, associated together for any commercial or trading purposes, and to which any privilege or privileges, or power or powers, shall, before or after the passing of this act, have been granted under the authority of the statute made and passed in the first year of the reign of her present Majesty, intituled "An Act for better enabling her Majesty to confer certain powers and immunities on trading and other companies," or by any act of Parliament, or any commercial or trading company or body, which by the said statute, made and passed in the first year of the reign of her present Majesty, is to be considered as subsisting, and to be subject to the provisions of the said statute in manner therein mentioned, or any company or body of persons, now, or at any time hereafter associated together, for any commercial or trading purposes, and registered either provisionally or completely under the provisions of any act passed, or to be passed, in the present session of Parliament, for the registration and regulation of joint-stock companies, or any joint-stock company now existing, and comprehended within the definition therein contained of a joint-stock company, shall commit any act which by this act is to be deemed an act of bankruptcy on the part of any such company or body,

a fiat in bankruptcy may issue against such company or body, by the name or style of the said company or body, upon the petition of any creditor or creditors of such company or body, (whether a member or members of such company or body or not), to such amount as is now by law requisite to support a fiat in bankruptcy; and the court authorised to act in the prosecution of such fiat, and all persons acting under such fiat, may proceed thereon in like manner as against other bankrupts, subject always to the provisions hereinafter made.

7 & 8 *Vict. c. 110, s. 2.*—And be it enacted, that this act shall apply to every joint-stock company, as hereinafter defined, established in any part of the United Kingdom of Great Britain and Ireland, except Scotland, or established in Scotland, and having an office or place of business in any part of the United Kingdom for any commercial purpose, or for any purposes of profit, or for the purpose of assurance or insurance, (except banking companies, schools, and scientific and literary institutions, and also friendly societies, loan societies, and benefit building societies respectively, duly certified and enrolled under the statutes in force respecting such societies, other than such friendly societies as grant assurances on lives to the extent hereinafter specified); and that the term

The former of these descriptions is that of a company corporate, within the provisions of the 7 & 8 Vict. c. 111, the 1st section of which extends to all commercial or trading companies then incorporated by act of Parliament.

Now, the purposes for which this company is incorporated are to realize profits, by permitting their pier to be used for landing passengers and goods, for lading and unloading ships, which of themselves must be considered com-

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“Joint-stock Company” shall comprehend—

Every partnership whereof the capital is divided, or agreed to be divided, into shares, and so as to be transferable without the express consent of all the co-partners; and also—

Every assurance company or association for the purpose of assurance or insurance on lives, or against any contingency involving the duration of human life, or against the risk of loss or damage by fire, or by storm or other casualty, or against the risk of loss, or damage to ships at sea, or on voyage, or to their cargoes; or for granting or purchasing annuities on lives: and also every institution enrolled under any of the acts of Parliament relating to friendly societies, which institutions shall make assurances on lives, or against any contingency involving the duration of human life to an extent upon one life, or for any one person, to an amount exceeding 200*l.*, whether such companies, societies, or institutions shall be joint-stock companies, or mutual assurance societies, or both. And also—

Every partnership which at

its formation, or by subsequent admission, (except any admission subsequent on devolution or other act in law), shall consist of more than twenty-five members;

And that, except where the provisions of this act are expressly applied to partnerships existing before the said 1st day of November, it shall be held only to apply to partnerships the formation of which shall be commenced after that date; provided, nevertheless, that except, as hereinafter specially provided, this act shall not extend to any company for executing any bridge, road, cut, canal, reservoir, aqueduct, water-work, navigation, tunnel, archway, railway, pier, port, harbour, ferry, or dock, which cannot be carried into execution without obtaining the authority of Parliament: provided also, that except, as hereinafter is specially provided, this act shall not extend to any company incorporated, or which may be hereafter incorporated, by statute or charter, nor to any company authorised, or which may be hereafter authorised, by statute or letters patent, to sue and be sued in the name of some officer or person.

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mercial purposes, if they do not actually constitute trading, the word "commercial" having by usage, whatever may be its etymological import, a more extensive meaning than trading.

But the case does not rest on this, because the company have power to construct wharfs and warehouses, and to make profits by permitting them to be used; and wharfingers and warehousemen are, by the express enactments of the bankrupt laws, made traders within their provisions. Moreover, the company have power to make a parade along the shore, and to erect baths and accommodations for bathing machines, which must, in any usual acceptation of the word "commercial," be comprehended within its meaning.

But even if the company were not a "commercial" one within the acts, still it would fall within the definition of a company, within the provisions of the 7 & 8 Vict. c. 111, because that act extends to all joint-stock companies then existing, and comprehended, within the definition of a joint-stock company, contained in the 7 & 8 Vict. c. 110. Now the definition of a joint-stock company, given in the last-mentioned act, comprehends every partnership whereof the capital is divided, or agreed to be divided, into shares, and so as to be transferable without the express consent of all the co-partners, and every partnership which, at its formation or by subsequent admission, shall consist of more than twenty-five members, (words, at all events, large enough to comprise the present company); the only question being, whether they are restricted by the subsequent proviso in the 7 & 8 Vict. c. 110, s. 1, that, except where the provisions of that act are expressly applied to partnerships existing before November 1, 1844, it shall be held to apply only to partnerships formed after that date. This proviso, however, does not belong to the definition of "joint-stock company," which is the only part of the 7 & 8 Vict. c. 110, incorporated into the part of the

7 & 8 Vict. c. 111, which is itself incorporated in the Winding-up Act, 1848. The qualifying and restrictive words in question restrain the operation of the Registration Act, 7 & 8 Vict. c. 110, but not the definition of a joint-stock company therein contained, and have, therefore, nothing to do with the Winding-up Act, 1848.

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 BURGE,
Re HERNE
 BAY PIER CO.

Mr. *Bacon* and Mr. *Roundell Palmer*, for the respondents, were stopped by the Court.

The VICE-CHANCELLOR:—

The provisions of the act 11 & 12 Vict. c. 45, ought not, I think, to be put in force except with regard to companies clearly and plainly coming within their meaning. The applicability of the language of the act to the company in question appears to me too doubtful to render it safe to make an order in this case. As to costs, I am ready to hear the counsel for the respondents.

Mr. *Bacon* and Mr. *Roundell Palmer*, for the respondents.—The case is free from all reasonable doubt. If there were any ground for saying that the corporation was a commercial or trading company, so as to be within the 7 & 8 Vict. c. 111, every lord of a manor, who obtains parliamentary powers to construct a pier, would thereby become liable to the bankrupt laws; and, in the whole course of the administration of these laws, no bankruptcy has ever been attempted to be supported on such grounds.

Next, as to the company being within the definition of a joint-stock company, contained in the 7 & 8 Vict. c. 110, s. 1. In the first place, the law of joint-stock companies has never been applied, and is not in the acts applied to a corporation. It is clear, that, for the purposes of the Winding-up Act, the words restricting the 7 & 8 Vict. c. 110, s. 1, to partnerships formed after the 1st of November, 1844, must be held to constitute a part of the definition; because the

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BAY PIER CO.

Winding-up Act, 1848, itself provides, at the end of the 1st section, that, in addition to the companies previously specified, it shall extend to all companies to be formed after its own passing, whereof the capital or the profits is or are divided or to be divided into shares, and such shares are transferable without the express consent of the co-partners; which would have been an unnecessary provision, if the definition of the 7 & 8 Vict. c. 110, s. 1, were supposed to be incorporated into the Winding-up Act, 1848, without the accompanying restriction.

Mr. *Swanston* and Mr. *Goodeve*, for the petitioner, were stopped by the Court on the question of costs.

The VICE-CHANCELLOR said that he considered the questions raised very reasonably arguable, and that the petitioner ought not to be ordered to pay costs.

Mr. *Swanston* and Mr. *Goodeve* asked for a case for the opinion of a court of law.

The VICE-CHANCELLOR doubted whether, upon a question of equitable jurisdiction, a case could be directed, but said he would allow the case to be spoken to upon that point, if desired. If not, the order would be to dismiss the petition, without costs.

The case was not mentioned again.

1849.

Jan. 12th.

Ex parte SPACKMAN, In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP ACT, 1848, and In the Matter of THE AGRICULTURIST CATTLE INSURANCE COMPANY.

THIS was the petition of two contributories to a company formed in the year 1845, under the name of the Agriculturist Cattle Insurance Company, for the purpose of insuring cattle, horses, and other animals against disease and death.

A registered company for the insurance of agricultural cattle, *held*, not so clearly a trading or commercial company as to be within the operation of the Winding-up Act, 1848.

The terms on which the company was constituted appeared by an indenture having no date except that of the year 1845; but the first signatures to the schedule of subscribers annexed to the said deed appeared to have been affixed thereto on the 11th of July, 1845. By the 3rd article of this deed it was provided,

“That the objects and business of the company shall be to make or effect assurances against loss by mortality in all kinds and descriptions of animals, whether biped or quadruped, being property or live stock belonging to farmers, keepers of exhibitions of animals, and others, or which may now, or at any time hereafter, be kept by any person or persons for the purpose of pleasure or profit, whether such mortality shall be occasioned by death out of apparent cause, during the period of insurance, or by the slaughter of any animal or animals in consequence of taint or infection, or suspected taint or infection, by or from any disease which shall be, or be considered to be, contagious or epidemic, endemic, or the animal or animals insured shall die, or, with the consent of the company, its officer or servant duly authorised in that behalf, be slaughtered in consequence of illness, disease, or accident, or other just means or cause.”

The fourth article enumerated the following additional objects, viz. to advance monies for the accommodation of agricultural landowners, farmers, shareholders, insurers, and other persons, on mortgage or other good securities, whether heritable or moveable, real or personal, in Eng-

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land, Wales, Scotland, Ireland, or the Isle of Man, and other the dependencies of Great Britain, in the seas adjoining thereto, and either for the purposes of planting, draining, and other permanent improvement of land, or for any other purposes, whether if untenanted or otherwise, as shall from time to time be thought proper, under and by virtue of these presents.

The fifth article was as follows: "And if a majority of two-thirds of the votes of the shareholders at any general meeting assembled, shall determine, and the determination shall be confirmed by two-thirds of the votes of the shareholders at a subsequent special general meeting, to be called not earlier than one month, nor later than six months after such determination, the object and business of the company may, or shall be, to make or effect assurances on human lives or survivorship, on the joint continuance of two or more lives, or on the duration of any one or more life or lives, and all such other assurances, whether connected with human life or not, as may be effected according to law, including endowments for widows and children, and other persons, and to make or effect insurances against losses or damage by fire, on buildings and goods, on land and on ships, barges, and vessels of all descriptions, in any port, harbour, or dock, and on the cargoes in or on board of such ships, barges, and vessels, and to purchase and sell annuities, either for lives or years, and on survivorships, and either immediate, deferred, reversionary, or contingent, and also life, reversionary, and other estates and interests real and personal."

The deed was subscribed by many more than twenty-five shareholders, and the company had been completely registered under 7 & 8 Vict. c. 110.

It did not appear that the requisite preliminary steps had been taken to extend the objects of the company, as contemplated in the 5th section.

The petition, and the affidavits in support of it, stated,

that on the 20th August, 1847, a report was made by the auditors, shewing a loss of 8564*l.* in six months, and that 7188*l.* had been drawn from the capital to meet the deficiency, but that, nevertheless, dividends had been declared, in violation of the provisions of the deed of settlement; that, from the balance-sheets and accounts, it appeared that the company had received, up to the 30th June, 1848, 132,712*l.* 5*s.* 1*d.* as premiums on insurance, and had paid, in losses and inspectors' charges, 139,944*l.* 0*s.* 6*d.*, and 18,883*l.* 11*s.* 11*d.* for expenses of management and bad debts; that, on the 2nd November, 1848, a proposition was agreed to at a meeting of shareholders, permitting shareholders, who wished to retire, to do so, on paying certain sums per share, according to the number of their shares; and that holders of 4262 shares had been permitted to retire on those conditions, the whole number of shares being only 13,100; but that the petitioners declined retiring on such terms, which, they submitted, were contrary to the deed of settlement.

The affidavits filed on behalf of the respondents stated, that if the steps which had been resolved upon were taken, the affairs of the company were still capable of being successfully and profitably carried on.

Mr. *Swanston* and Mr. *Collins*, in support of the petition.—The Winding-up Act, 1848, applies; for this is a company within the provisions of the 7 & 8 Vict. c. 111, being associated together for commercial or trading purposes, and is registered completely under the 7 & 8 Vict. c. 110. "Commercial" must be taken to mean something different from trading, as appears from the expression used in the bankrupt laws, of "the trade of merchandise" (a). Lord *Mansfield*, in *Hankey v. Jones* (b), says, "The question here arises on a special case,

(a) 6 Geo. 4, c. 16, s. 2, taken from 13 Eliz. c. 7, s. 1. As to the import of the word "commercial," see *M'Kay v. Rutherford*, (Privy

Council, Dec. 11 and 12, 1848), 13 Jur. 21.

(b) Cowp. 747.

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whether this act of drawing bills is such an act as makes the defendant a scrivener within the meaning of the several statutes against bankruptcy. Every man who draws bills of exchange does a merchandisable act, but that does not render him liable to become a bankrupt." Lord *Mansfield*, therefore, thought that the bankrupt laws did not apply to a mere commercial act, which was not trading. So Lord *Eldon*, in referring to this dictum of Lord *Mansfield*, says, in *Ex parte Bell* (a), "It is insisted that underwriting is what Lord *Mansfield*, in the case of *Hankey v. Jones*, terms, by a singular expression, a merchandisable act;" and Lord *Eldon* then goes on to decide that a mere underwriter cannot, as such, be a bankrupt. Now, the use of the word "commercial" shews that this act was intended to be more extensive than the bankrupt laws in its operation, and to extend to insurance, which, if not an act of trading, is what Lord *Mansfield* terms a "merchandisable" act. That the act of 7 & 8 Vict. c. 111, which applies to the bankruptcy of public companies, is meant to extend to commercial as well as trading companies, appears further from the 15th section, which empowers the courts, acting in the prosecution of fiats against companies, to summon any person whom the Court shall believe capable of giving information concerning the *commercial* dealings or trading, or of any act or acts of bankruptcy committed by the company. The corresponding proviso, in the 6 Geo. 4, c. 16, s. 33, uses the word "dealings" only. The word "commerce" is thus explained in Richardson's Dictionary:—"To divide or share, mutually each—a part of his own for a part of another's; to exchange, to bargain and sell; to trade or traffic; to have or hold intercourse for purposes of trade or traffic; to have or hold intercourse—generally." And the following passage in Adam Smith, b. 1, c. 4, is referred to:—"Every man lives by exchanging, or becomes in some measure a merchant, and thus society itself grows to be what is pro-

(a) 15 Ves. 356.

perly a *commercial* society." Also the following passage from Burke:—"If you think this participation was a loss, *commercially* considered, but that it has been compensated by the share which Scotland has taken in defraying the public charge, I believe you have not very carefully looked at the public accounts."

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Mr. *Russell*, for the respondents, was stopped by the Court.

The VICE-CHANCELLOR:—

I continue of the opinion which I expressed upon a petition relating to the Herne Bay Pier Company, that the Court ought not to act upon the statute of the 11th and 12th of the Queen, unless in cases clear of doubt. I am of opinion that the question, whether this particular company is within the provisions of the act, is much too doubtful to render it prudent, safe, or proper, to treat it as within those provisions.

Mr. *Russell* asked that the petition should be dismissed, with costs.

Mr. *Swanston* contended, that, as the question was doubtful, the same course should be adopted as in the *Herne Bay Pier case* (a).

The VICE-CHANCELLOR inquired on what ground the petition was presented, assuming the company to fall within the provisions of the act.

Mr. *Swanston* and Mr. *Collins* entered into the details of the case, and contended, that the evidence clearly proved the company to be in insolvent circumstances, and that the retirement of the holders of one-third of all the shares was a virtual dissolution. They also contended, that, even if the case did not fall within either of the seven cases parti-

(a) Ante, p. 588.

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cularly specified in the act, yet it fell within the 8th, or general provision, authorising the Court to make the order, when any other matter or thing shall be shewn, which, in the opinion of the Court, shall render it just and equitable that the company should be dissolved.

The VICE-CHANCELLOR did not think a sufficient case made out to exempt the petitioners from payment of costs.

Petition dismissed, with costs.

April 19th.

An appeal from this decision, to the Lord Chancellor, was dismissed, with costs, on the ground that the circumstances did not constitute a case for the application of the act, whether the company was of a nature to fall within its provisions or not; as to which, the Lord Chancellor gave no opinion. His Lordship said, that none of the tests of insolvency specified in the act were shewn to exist; that the general clause must apply to cases *ejusdem generis* with those specified; that the Court could not look into the accounts of a company to ascertain whether it was solvent; that the retirement of a large number of shareholders did not, under the circumstances, amount to a virtual dissolution; and that, to avoid the necessity of discussing the question, whether the company came within the meaning of the act, his Lordship gave judgment on the facts alone.

Feb. 10th. *Re* BRIGHTON, LEWES, AND TONBRIDGE-WELLS DIRECT
 RAILWAY COMPANY.

THIS was the petition of a "contributory" to the above company, to have its affairs wound up, under the Winding-up Act, 1848. The company was formed in October, 1845, An order under the Winding-up Act, 1848, made in the case of a provisionally registered railway company. If no office of the company can be found, the Court may make the wind-up order, on the petition having been advertised according to the act, and upon a consent on the part of some member of the company.

for the purpose of constructing a railway from Tonbridge Wells to Brighton, and taking the necessary steps for obtaining an act of Parliament to enable them to carry the project into execution, subject to the stipulations of a subscribers' agreement and subscription contract, which were of the ordinary description in similar cases. The company was provisionally registered. The debts and liabilities of the company were stated at 3800*l.*, and the assets at 700*l.* only. The affidavit stated, that no office of the company could be found.

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Mr. *Wigram* and Mr. *Logie* supported the petition.

The VICE-CHANCELLOR.—Are companies of this description within the act?

Mr. *Wigram* and Mr. *Logie*.—The Winding-up Act, 1848, applies to all companies within the 7 & 8 Vict. c. 111. Among the companies comprised in the latter act are all companies or bodies of persons then or at any time thereafter associated together for any commercial or trading purposes, registered under the 7 & 8 Vict. c. 110, and comprehended within the definition therein contained, of a joint-stock company.

The VICE-CHANCELLOR:—

I have held it not clear that a company for the insurance of cattle was associated for trading or commercial purposes (*a*), and I declined applying the provisions of the act to such a company; but a railway company, being carriers, may perhaps fall within the description. Upon whom has the petition been served?

Mr. *Wigram*.—The affidavit states, that no office could be found at which the petition could be served, nor any officer of the company. Under the 10th section of the Winding-up Act, 1848, it would, under such circumstances, be competent to the petitioner to serve any member with

(*a*) See last case.

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the petition. It will, therefore, be sufficient if a brief on behalf of some member is produced to the reg

The VICE-CHANCELLOR thought this sufficient, and admitted the order to be drawn up on the production of a brief (a), the proper advertisement, and an affidavit the party appearing by counsel and consenting was a member of the company.

(a) In a subsequent case of the *London and Manchester Direct Railway Company (Remington's line)*, after a lengthened argument, the Vice-Chancellor *Knight Bruce* considered it doubtful whether a railway company, provisionally registered only, came within the provisions of the act, and declined making an order to wind up the affairs of such a com-

pany. But, on appeal before Lord Chancellor, his Lordship held, that the company was within the scope of the act, and made the order, (see *Ex parte Be Jur.* 395); from which an appeal was lodged. The Lord Chancellor refused to suspend the proceedings under the order, pending appeal. See 13 Jur. 396.

May 8th. Re THE NISTER DALE IRON COMPANY, and Re THE STOCK COMPANIES WINDING-UP ACT, 1848.

HUGHES'S CASE.

An official manager of a joint-stock company appointed under the Winding-up Act, 1848, entered into an agreement with the executrix of a deceased shareholder, to accept 2000*l.*, in lieu of a much larger sum claimed to be due in respect of the then present call already made, and together with a security for the contribution by her towards a call, to the extent of 1000*l.*, as a compromise of all claims of the company on the executrix, of which agreement the Master certified his approval by a special report, upon motion, confirmed the report.

UNDER the order for winding up the affairs of the Dale Iron Company, the usual reference had been made to Mr. Farrer, and was in the course of prosecution.

The Rev. T. S. Hughes, deceased, had been a holder of shares in the company, and had personally joined in guaranteeing a debt owing by the company to Mr. Luke J.

The official manager claimed to place the name of Hughes, the executrix and general residuary devisee of the Rev. T. S. Hughes, on the list of contributors to the company, on those characters, which was opposed on her behalf.

The official manager entered into an agreement for the compromise of all questions with Mrs. Hughes. According to this agreement the sum of 2000*l.* was to be paid by Mrs. Hughes to the official managers, in discharge of all liability of the estate of her testator in respect of the then present call, by two instalments of 1000*l.*, one to be paid on the confirmation of the compromise by the Master, and the remaining 1000*l.* on the 30th of July, 1849. Mrs. Hughes was immediately to take the proper steps to obtain the confirmation of the compromise by the Court of Chancery, to which the official manager agreed to appear and consent; and immediately after such confirmation should have been obtained, Mrs. Hughes was to enter into a proper deed of covenant with the official manager, that in case of any further call being made upon the contributories of the company, she would pay such calls upon the estate of her testator to the extent of the further sum of 1000*l.*, and would execute a first charge upon the estate of her testator, to secure the performance of such covenant; and also, that, as the above mentioned sums were proposed to be paid in full discharge of all liability on the part of Mrs. Hughes, as the executrix and general devisee of her testator, or upon the estate of her said testator, it was agreed that Mrs. Hughes should not be called upon to pay any sum beyond the first 2000*l.*, until after the debts owing by the company to Mr. Luke Jones, for which the testator had joined in a guarantee, should have been satisfied; and that Mrs. Hughes should be entitled to recover from the company any sums which she might be called upon to pay in respect of that or any other guarantee or liability in respect of the company, or deduct the same from the further sum of 1000*l.* to be paid by her in case of any further call being made upon the contributories. These terms were to be considered as a compromise of all claims of the company, or of the official manager, against Mrs. Hughes, or the estate of the testator, as the holder of the above-mentioned shares,

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but without prejudice to any right to enforce payment of certain balances of 4035*l.* 7*s.* 6*d.* in respect of the then present call, in case Mrs. Hughes should fail in performing the agreement.

The Master approved of the above compromise, and signified such approval by writing the same in the margin of the memorandum of agreement; and, at the request of Mrs. Hughes, he gave out a special certificate thereof.

Mr. *J. Baily*, on behalf of Mrs. Hughes, now moved, upon notice served upon the official manager, that the Master's special certificate might be confirmed.

The official manager appeared by counsel, and consented (*a*).

The VICE-CHANCELLOR confirmed the certificate.

(*a*) By sect. 88 of the Winding-up Act, 1848, it is enacted, "that it shall be lawful for the official manager, with the approbation of the Master, from time to time to enforce payment of, give time, or compound, or require or take, any security for any balance or claim as against any of the contributories of the company; and also to abandon any such balance or claim, where the contributory against whom the same is claimed, shall die, or be found and adjudged bankrupt, or take the benefit of any act for the relief of insolvent debtors, or dwell or escape beyond seas, or be known to be insolvent or incapable of paying his debts, or in such other cases as the Master shall think fit; and it shall not be necessary to include, in any subsequent call, any contributory against whom any balance or

claim shall have been abandoned, but the whole amount of every subsequent call shall be apportioned among the other contributories: Provided always, that nothing herein contained shall extend to discharge the estate of any such contributory so left out of any call, from any claim which may exist against the same on behalf of the company, or any other contributory thereof; but that it shall be lawful for the official manager to prove for the amount thereof in the matter of such bankruptcy or insolvency (if any), and to receive dividends thereon, or to proceed against such contributory for the same, whenever it may appear expedient so to do; and any monies, so to be recovered, shall be dealt with as part of the assets of the company, or otherwise as the Master shall direct."

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SHACKLETON v. SUTCLIFFE.

*Nov. 5th, 6th,
8th, & 18th.*

THE plaintiffs were devisees in trust of the will of Edmund Wadsworth, and under the trusts of the will had power to sell a certain farm and lands, called Higher Murgatshaw, near Halifax.

In execution of the trusts, they put up the farm and lands for sale by public auction, pursuant to a certain particular of sale, which described the property as eligible for building purposes, and subject to certain conditions, among which were the following:—

7th. "That the vendors shall, within six weeks from the day of sale, make out, at their own expense, an abstract of their title to the premises, according to the tenure thereof stated in the particulars on the other side; such abstract to be delivered to the purchaser, or his or her solicitor, on

The owner of land, situated on an acclivity, conveyed, by a deed of 1816, a portion of lower land, with liberty to enter on upper lands, and fetch water from a spring, and to cut open, cleanse, and cover in, such gutters and drains as might be necessary for the purpose of conducting the spring to the conveyed land; and also, with liberty to pass and repass, for

ingress and egress, on the upper land around or adjoining the conveyed land, and to put any ladders against the cottages then intended to be built upon the conveyed land.

By another deed of 1820, other part of the lower land was conveyed, with liberty to take water from specified springs in the higher land, and to make such reservoirs in a particular field, part thereof, as might be necessary for taking up water for family use and other necessary purposes, and with liberty to pass for ingress and egress in the upper land surrounding or adjoining the conveyed land.

By other deeds of 1824, other portions of the lower land were released, with all water-courses, particularly as the same ran to an inn on the conveyed land, from the upper land.

By other deeds of 1825, further portions of the lower land were released, with liberty to fetch water for family and domestic uses, at a well on the higher land.

By other deeds of 1834, other part of the lower land was released, with liberty to the releasees to make a covered goit, or water-course, across the bottom part of a field, part of the upper land, and to open and repair the same when necessary.

Several years afterwards, the upper land was sold, according to a particular, describing it as fit for building, and subject to conditions of sale, providing, that, if any mistake were made, in the description of the premises, or if any other error should appear in the particulars, such error or omission should not annul the sale, but compensation should be given or taken. The existence of the easements was not stated in the particulars or conditions:—

Held, First, that the circumstances of the purchaser living in the neighbourhood, being acquainted with the property, and passing constantly some of the wells on the lower land, supplied from the upper land, did not affect him with notice of the existence of the easements.

Secondly, that the existence of the easements, granted by any one of the deeds of 1816, 1820, and 1834, alone constituted a material defect in the title to the upper land.

Thirdly, that the existence of the easements, granted by the deeds of 1824 and 1825, would have been alone sufficient to render the title subject to such serious doubt, that a purchaser could not be compelled to accept it.

Fourthly, that, under the circumstances, and inasmuch as the whole purchased land did not exceed thirty acres, the purchaser could not be compelled to take the title, with compensation as to the lands prejudicially affected, which admeasured about four acres and a half.

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application for the same, at the office of Messrs. Su
 solicitors; and such purchaser shall, within one
 after such abstract shall have been delivered to
 his or her solicitor, give notice to the vendors or
 solicitors, whether the title is satisfactory or not; i
 case he or she shall declare himself or herself diss
 therewith, the vendor's agent or solicitor shall be at
 to return the deposit money, and re-sell the premi
 compel an execution of the contract, as the vendo
 think fit; and in case the purchaser does not giv
 notice of his or her being dissatisfied with the title,
 one month, as aforesaid, the purchaser shall be cons
 as having accepted the title as developed by the abs

14th. "That, if any mistake be made in the desc
 of the premises, or, if any outpayment (other than
 mentary or parochial taxes), to which the premis
 be subject, shall be omitted to be mentioned and sp
 at the sale, or if any other error whatsoever shall
 in the particulars of the estate, such error or on
 shall not annul the sale, but compensation or equi
 shall be given or taken, as the case may require."

The 16th condition provided, that, if the pur
 should neglect or fail to comply with the above cond
 or any of them, in any respect, his or her deposit
 should be actually forfeited to the vendor, who wa
 at liberty to resell the premises, either by public a
 or private contract, and the deficiency (if any) in
 arising from such second sale, together with all ex
 attending the same, were to be made good by the pur
 making such default.

The defendant was declared the purchaser at th
 but, on investigating the title, he declined to compl
 purchase, on the ground that the lands were subj
 certain water rights and other easements, in favour
 owners of lands lying below those purchased, gran
 various deeds; and the present suit was instituted
 force a specific performance.

One of the deeds was dated February 20th, 1816, and made between John Wadsworth, a former owner of the property now sold, of the one part, and Roger Varley, of the other part, whereby John Wadsworth, in consideration of 9*l*., conveyed to Varley, his heirs and assigns, a piece or parcel of land or ground, then set out for building, situate in certain closes or fields forming part of the property now in question, and called Lower Hey and Briggfield, parcel of an estate called the Shaw, in Stansfield aforesaid, belonging to the said John Wadsworth, containing in the whole, by admeasurement, 180 superficial square yards of land or ground, together with the appurtenances, (particularly, full and free liberty, power, and authority to and for the said Roger Varley, his heirs and assigns, to fetch and carry water from a certain spring or rise of water, in the said close of ground, called the Lower Hey, belonging to the said John Wadsworth; and to cut, open, dig, cleanse, and cover in such gutters and drains as might be necessary for the purpose of conducting the said spring or rise of water towards the said piece or parcel of land;) and also full and free liberty, power, and authority to and for the said Roger Varley, his heirs and assigns, tenants, servants, and workmen, to pass and repass for ingress, egress, and regress, on foot, in the lands and grounds of the said John Wadsworth, around or adjoining the said piece of land; and to put any ladder or ladders to or against the cottages or dwelling-houses forthwith intended to be erected upon the said piece of land, (excepting, nevertheless, and always reserving thereout, unto the said John Wadsworth, his heirs and assigns, owners and occupiers of the said estate called the Shaw, full and free liberty, power, and authority to take and carry away all such ashes and necessary dung as should arise, be bred, or made at the buildings intended to be erected as aforesaid, and premises, at his and their free will and pleasure, without making or allowing any recompense for the same,

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under their providing ground for the necessary house and outbuildings for reserving and erecting a mill, heirs and assigns all such manner, manner, and things as might be best be made by keeping horses, cattle, and pigs to eat hay, straw, or fodder upon the premises, to hold to Wadsworth, his heirs and assigns for

Another of the deeds was of the same date and made between John Wadsworth of the one part and Sutcliffe of the other part, being a conveyance of a of land to Sutcliffe in precisely the same terms as the with the same powers expressed in the same language.

On the two plots of ground comprised in these there had been built five houses, which were supplied water from a spring situate in part of one of the parcels of land, called Longfield, which were the subject of the chase, and the inhabitants of those houses claimed exercised the rights granted by the above indenture.

Another of the deeds was an indenture of feoff dated the 3rd of November, 1530, and made between said John Wadsworth and Edmund Wadsworth, the latter's testator of the one part, and one John Walton, of the other part, whereby the two Wadsworths conveyed John Walton, his heirs and assigns, 230 superficial yards of land, therein particularly described, and two closes, called Briggfield and Hillyfield, together with all ways, paths, passages, rights, liberties, privileges, advantages, and appurtenances, to the same piece or parcel of land or ground belonging or in any wise appertaining particularly, full and free liberty, power and authority and for the said John Walton, his heirs and assigns take up water from certain springs or rises of water in the said two closes of land, called the Briggfield and Hillyfield aforesaid, and to make such reservoir or pond therein, as might be necessary for taking up water therefrom for family use and other necessary purposes, at the buildings to be erected upon said

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piece, or parcel of land or ground ; and likewise, full and free liberty, power, and authority, to and for said John Walton, his heirs, assigns, tenants, servants, and workmen, to pass and repass, for ingress, egress, and regress, on foot, in the lands and grounds of them the said John Wadsworth and Edmund Wadsworth, around or adjoining said plot, piece, or parcel of land.

Walton had built a dye-house and three cottages on the ground conveyed to him by the last-mentioned feoffment, and another cottage had been afterwards built thereon, but he had not as yet made such reservoir as was mentioned in the feoffment.

Others of the deeds bore date May 3rd and 4th, 1824, and were made between John Wadsworth and Edmund Wadsworth, the testator, of the one part, and William Midgley of the other part, whereby John Wadsworth and Edmund Wadsworth, in consideration of 300*l.*, conveyed to William Midgley, his heirs and assigns, all that messuage, dwelling-house, or tenement, then occupied as a public-house, with the brewhouse, necessary house, yards, gardens, and appurtenants thereunto belonging, called or commonly known by the name of the New Delight ; together with all houses, outhouses, edifices, buildings, folds, yards, back-sides, fronts, frontsteads, ways, paths, passages, waters, water-courses, (particularly as the same then ran to the said messuage or dwelling-house and premises from the lands of the said estate called Murgatshaw), easements, liberties, privileges, hereditaments, and appurtenances whatsoever, to the said messuage, dwelling-house, or tenement and premises belonging or in anywise appertaining, to hold to the said William Midgley, his heirs and assigns, for ever.

Others of the deeds bore date August 25th and 26th, 1825, and were made between John Wadsworth and Edmund Wadsworth, the testator, of the one part, and Thomas Horsfall, of the other part, whereby John Wadsworth and Edmund Wadsworth, in consideration of 9*l.* 14*s.* 7*d.*, conveyed

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to the said Thomas Horsfall, his heirs and assigns, a parcel of land, parcel of the estate called Murgatshaw, with liberty and privilege for the said Thomas Horsfall his heirs and assigns, as owners and occupiers of the messuages, dwelling-houses, and buildings to be erected on the said plot of ground, from time to time, and at all times thereafter, to fetch and take up at pleasure for family and domestic uses, at the well or syke of the said messuage on the south side of and adjoining Shaw-lane afore-mentioned and at or near the messuage there called Murgatshaw.

The only other deeds on which the objections were founded, were indentures of lease and release, dated respectively the 11th and 12th days of July, 1834, the latter made between John Wadsworth, of the first part, Edmund Wadsworth, of the second part, George Saltonstall, of the third part, and John Sutcliffe, of the fourth part, whereby John Wadsworth and Edmund Wadsworth conveyed to George Saltonstall his heirs and assigns, a close called Hilly Field, and the liberty and privilege for the said George Saltonstall his appointees, heirs, and assigns, at any time or at all times thereafter, when he or they should think proper, to dig, or make a covered goit or water-course, in, through, over, or across the bottom part of a close called Jarfield, belonging to the said messuage called Murgatshaw, and at all times thereafter to open, cleanse, and repair the same when necessary, doing as little damage thereon as might be, and making full satisfaction for such damage or injury as should unavoidably happen, and all other covenants, hereditaments and appurtenances to the same premises in any part thereof, respectively belonging or appertaining.

The tenant occupying the farm deposed, that the defendant called upon the witness on the morning of the sale to request the witness to go with him upon the lands sold, that the witness went with him into several closes, called the Bedlams and the New Field, and thence into a close called Shaw-lane, and that the defendant examined the fields and the building of the witness's house; that

witness knew the defendant's residence, called Slater Jug, where he had resided thirty years last past, and upwards. That such residence was about three quarters of a mile distant from the farm, which was very visible to any person standing in the fold or yard at Slater Jug; that the defendant, for many years before he entered into the contract, had been in the habit of occasionally passing and repassing on the road leading by the estate, and the cottages, dye-house, and New Delight Inn; and that the wells supplied from the upper lands were easily to be seen by a person passing on the road, except one well, the channel whereto might be seen.

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The auctioneer deposed, that he had known the defendant twenty-five years, and that the defendant was, in the witness's judgment and belief, well and intimately acquainted with the estate, and all the privileges and easements relating thereto, and also to any water-courses, springs, or wells of water connected therewith; and the witness said, that his belief of the defendant being so was founded on the fact, that the defendant had resided above twenty years at Slater Jug, within one mile, and within sight of the estate, and because he was a large owner of farms in the immediate neighbourhood, and personally looked after and frequently inspected the same.

Another witness deposed, that the defendant was in the habit of passing along Shaw-lane, and frequenting the New Delight Inn occasionally, and was, as the witness believed, acquainted with the well at which the inhabitants of Horsfalls and Oliver's Cottages took up water; with another of the wells called Pearl Well; with the watering-trough in Brigg Field, and with the trough in the fold of the New Delight.

Upon the question, whether the rights complained of were injurious to the estate or not, the evidence was of a very conflicting character, the defendant's witnesses deposing that the land could not be profitably, or at all, sold for building purposes, and would be much depreciated in

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value, on account of being subject to such rights the witnesses said, that, from his experience in relating to water-courses, he was satisfied that he could commence building on the property without being subject to vexatious and expensive litigation, or of the rights in question.

Other witnesses deposed, that, assuming the fee to be subject to the rights of persons to take water to the house and to open, cleanse, and scour the channels of the water, the land could not be sold to advantage for building purposes for want of having a certain quantity of water to the house; and that, upon the same assumption, it would be very much depreciated in value for agricultural or manufacturing purposes.

On the other hand, the plaintiff's witnesses deposed, that the lower part of the estate was very marshy and required draining, and that every means of getting off this water added to the value of the property. They considered the water privileges complained of as a benefit to the estate, as some of the drains did carry manure to the land; and they all said, they were of the opinion that none of the matters complained of would be of the least detriment to the full and due occupation, possession, and enjoyment of the estate.

Mr. Wigram, Mr. Stinton, and Mr. Malins, for the defendant, shewed that the water-rights, although granted by the deed referred to, are not more extensive, or at least do not interfere to any greater extent with the use of the lower lands than those which the situation of the lands themselves would have conferred upon the owners of the lower lands. The defendant, from living in the neighbourhood of the property, and knowing the existence of the wells in the lower lands, must have known that these wells were supplied from the upper lands for a sufficient time to give the owners of the lower lands a right to take the water, whether there was an express grant or not. And

of entering upon the higher lands, to repair the channels and remove obstructions to the enjoyment of the easement, follows as an incident to it (a): *Raikes v. Townsend* (b). They also cited the Digest, lib. 8, tit. 4, s. 11 (c).

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The only other easement is that of ingress and egress from the surrounding land, which also would exist without grant, as incident to the conveyance. As to the right to place ladders, there is no evidence that this right has been exercised, or has occasioned, or is likely to occasion, any inconvenience. It is clear, that the property must be used for agricultural purposes, and it is impossible to conceive how it can be prejudicially affected by such a right. At all events, the diminution of value (if any) is a proper subject of compensation under the 14th condition.

Mr. *Russell* and Mr. *Follett*, for the defendant.—The channels for the water are subterranean; so that, if there had been no grant, an easement would not have been acquired by user, *Acton v. Blundell* (d), and the defendant would have been entitled to stop the water-course.

They cited *Flight v. Booth* (e), and *Hall v. Swift* (f).

(a) *Gale on Easements*, 327, 398, 2nd ed.; *Bracton*, lib. 4, fol. 232; *Year Books*, 9 Edw. 4, M. T. p. 35.

(b) 2 *Smith*, 9.

(c) "Refectionis gratia, accedendi ad ea loca, quæ non serviant, facultas tributa est his, quibus servitus debetur: quæ tamen accedere eis sit necesse; nisi in cessione servitutis nominatim præfinitum sit, qua accederetur; et ideo nec secundum rivum, nec supra eum, si forte sub terrâ aqua ducatur, locum religiosum dominus soli facere potest, ne servitus intreat: et id verum est: sed et depressurum vel ad levaturum rivum, per quem

aquam jure duci potestatem habes; nisi si, ne id faceres, cautum sit. Si prope tuum fundum jus est mihi aquam rivo ducere tacita hæc jura sequuntur, ut reficere mihi rivum liceat, ut adire quæ proxime possim ad reficiendum eum ego, fabrique mei: item, ut spatium relinquat mihi dominus fundi, quo dextra et sinistra ad rivum adeam, et quo terram, limum, lapidem, arenam, calcem jacere possim."

(d) 12 M. & W. 324.

(e) 1 Bing. N. C. 370; *S. C.*, 1 Scott, 190.

(f) 4 Bing. N. C. 381; *S. C.*, 6 Scott, 167.

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The *Vice-Chancellor* adverted to a passage in the first answer, which alleged that the plaintiffs and their solicitors knew, and studiously avoided disclosing, the existence of these easements.

Mr. *Wigram*, in reply.—It nowhere appears that the plaintiffs had any personal knowledge of the existence of the easements, and the solicitor denies any concealment on his part. The existence of the well, and the right of the cottagers to use it, must have been apparent to the purchaser, as he passed and repassed continually; and, though he denies that he, in fact, knew of the usage, the knowledge must be imputed to him. Now, assume that this right was an ancient public right to the well, would not the onus of keeping open the channels be *primâ facie* on the owner of the upper lands, whence the water flowed; and would it not be a consequent of the public right, that those who had it might enter to cleanse and keep open the stream? Would that be an objection to the title? It is submitted, that the obligation under the express grant is not more onerous; and this obligation raises no objection entitling the defendant to resist specific performance of his contract.

All the other objections concern only the Long Field and New Delight Field, which together admeasure about four acres and a half, the whole purchase being of thirty acres. The residue at least remains, which the purchaser is bound to take with an abatement, or the whole should be taken with compensation, under the provisions of the conditions of sale.

Acton v. Blundell has been cited; but that case has no application even to the well used by the cottagers, because the purchaser was bound to assume, that a water-course in these purchased lands existed by ancient usage to that well; nor does it apply to the other grants of use of water, and the other water-courses, in this case, because they are surface streams, whilst the water-course in *Acton v. Blundell* was subterranean.

The VICE-CHANCELLOR:—

It is, I think, clear, that the title of the vendors in this case, was at the time of the contract, was at the commencement of the suit, and is at present, bad or defective.

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This is, indeed, admitted by their counsel, subject to three questions which have been raised, namely—

First, Whether, before the contract, the purchaser had not such a degree of knowledge, or notice, of the state and condition of the property, as to preclude him wholly or in part from taking the objections that he has made—a point as to which, though some evidence has been addressed to it, the case of the plaintiffs, the vendors, in my opinion, fails.

Secondly, Whether the defects are not all immaterial; upon which point also the plaintiffs, I think, fail. And,

Thirdly, Whether, if there are any material defects not removable, they are within the 14th condition?

The only defects shown to exist are defects in the quality of the estate, by reason of the easements or rights vested in third persons, under the several deeds of 1816, 1820, 1824, 1825, and 1834 (which were necessarily so often mentioned during the argument), or some of those deeds.

On the ground of these defects, the defendant, the purchaser, who says that they are material and important, wishes to reject the purchase altogether, and insists that he is entitled to do so; while the plaintiffs, contending that the defects are wholly immaterial, say, that so far, if at all, as they are material, and shall not be cured or removed, they are properly subjects of compensation; that the contract ought to be performed on that footing; and that, as to the defects (if any) existing, by reason of the deeds of 1834 and 1820, they may be able to procure acts to be done for relieving the title, and freeing it from them; and they ask the opportunity, if necessary, of doing so in the Master's office.

But, as to the defects (if any) existing, by reason of the

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deeds of 1816, 1824, and 1825, respectively, the plaintiffs admit, that these cannot be cured or removed, and that so far, if at all, as they are material, nothing can be done by the plaintiffs, in respect of them, except the making of compensation.

Now, upon the contract and evidence, my opinion is, that by reason of each of the deeds of 1816, 1820, and 1834, severally, there exist material defects in the title; that the easements or rights which they confer respectively on third persons affect the property prejudicially, to a material extent, and are easements or rights to which the defendant did not contract to buy it subject; and that, on the ground of them, therefore, he is entitled either wholly to reject the purchase, or, if not, at least to have them extinguished within a reasonable time, or, so far as they may not be so extinguished, to be compensated.

I think, also, that it is at least doubtful whether the same ought not to be said of the deeds of 1824 and 1825, and of the easements or rights conferred on third persons by those deeds respectively; and that, to the benefit of the doubt, the defendant is entitled.

In saying this, I assume (though without deciding), that, had the messuages and parcels of land conveyed by the deeds of 1824 and 1825 respectively, been no part of the Murgatshaw estate, nor belonging to either of the Wadsworths, but been otherwise acquired by Midgley and Horsfall, and had the possessors for the time being of those messuages and parcels of land had, from a time preceding September, 1825, as to one property, such flow of water to it, and such use of the well near the house of Murgatshaw as they have, in fact, had respectively, but without and independently of the deeds of 1824 and 1825, without any express grant and without any express contract, the defendant could not have sustained any objection or claim on that score.

Assuming this, however, I apprehend it to be not by any means clear that the case, in this respect, is, between the

plaintiffs and the defendant, in the same situation upon the actual facts as they exist. These messuages and parcels of ground were parts of the Murgatshaw estate up to certain periods previous to September, 1825, and the water rights to which I am now referring arise under express grants made in 1824 and August, 1825, by the then proprietors of the Murgatshaw estate, the Wadsworths.

Have Midgley and Horsfall, or those who represent them in interest, no more power, no greater nor more extensive right, (as far as what still remains the Murgatshaw estate is concerned,) in the actual, than they would in the supposed, case? Are the vendors, or will the purchaser completing his purchase, be able or entitled to use, enjoy, and deal with the lands, the subject of the contract, as freely, as fully, and with as ample dominion, in the actual as in the supposed case?

Upon these questions, or (if they are one) this question, I repeat, that I entertain serious doubt; and as my opinion is, that, by reason of the rights of Midgley and Horsfall, or those who represent them, (if there were no other objection to the title), the purchaser ought not to be compellable to take the title, or, at least without compensation, to take the title, supposing these questions, or this question, to be free from doubt, and to be properly answered in favour of Midgley and Horsfall, or those who represent them; I am also of opinion, that, by reason of those rights, if there were no other objection, he ought not to be compelled to do so as the case stands.

A title open to serious doubt is not, by this Court, forced on a purchaser.

Such appears to me the state of things, in which it is necessary now to determine between the parties, whether, as the plaintiffs contend, the case ought to be sent into the Master's office, or whether, as the defendant contends, the bill ought now to be dismissed, notwithstanding the 14th condition of sale—a question upon which the purchaser's

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case, if it is not assisted, is at least not prejudiced by the strong provisions in the vendors' favour made by the 7th and 16th conditions.

In considering this question, it has appeared to me not immaterial to bear in mind the limited extent of the surface of the property sold, (containing, in the whole, not so much as thirty acres), and the reference to building purposes and to water, contained in the particulars of sale; nor is it, I think, superfluous to observe, in how many different parts, and how largely (the average of the property considered) the rights existing under the several deeds that have been mentioned affect the estate; to say nothing of the other easements, which cannot, I think, be disregarded.

Whether, if a portion only of these defects in the title existed, or the case were in any other respect different from its actual state, the plaintiffs would be entitled to some decree, I need not say; but, as the matter stands, seeing what the rights in question are, the extent to which those from which the plaintiffs avow the impossibility of freeing the property affect it, and the importance, likewise, as it seems to me, of those from which there is an absence of certainty whether it can be freed,—considering also that, without imputing (for I do not impute) fraud, or any unfair intention to the vendors, or any agent of the vendors, they must be considered, by omission of what ought not to have been omitted, to have misdescribed the subject of sale by their own default, and in their own wrong,—considering, also, the course taken by each party between the time of the contract and the institution of the suit, I should be applying the 14th condition of sale to a purpose, and to an extent, to which, in my judgment, it ought not to be treated as having been intended to be applicable, were I, in the circumstances before me, to give the plaintiffs a decree on the ground of it. And by applying in their favour, as to the defects in question, general principles, on which this Court allows compensation to be forced on a

purchaser, in some cases, for defects in the quality of the estate, and allows a vendor, in some cases, the opportunity of making good, in the Master's office, a title, bad confessedly when the contract was made and when the suit was instituted, as well as at the hearing of the cause, I should be, in my view, misapplying those principles.

The consequence is, that, in my judgment, it is fit now to dismiss the bill.

I must, I think, give the defendant the costs of the suit, except so far as they have been incurred by the defendant having imputed fraud or unfair intention to the plaintiffs and their solicitors. As the dismissal ought to be prefaced by a statement of the plaintiffs' admissions, the decree should probably be in some such form as this:—

“The plaintiffs, by their counsel admitting that the hereditaments contracted to be sold to the defendant, as in the pleadings mentioned, are subject to the easements or rights granted and created by the indentures of 1816, 1820, 1824, 1825, and 1834, in the pleadings mentioned, and that they are unable to obtain or procure a release or discharge thereof, so far as the said indentures of 1816, 1824, and 1825, and the easements or rights thereby respectively granted or created are concerned, and not certain of being able to obtain or procure a release or discharge thereof in other respects, this Court dismisses the bill, with costs, except so far as the costs have been increased by the defendant having imputed fraud or unfair intention to the plaintiffs and their solicitors, or any or either of them.”

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Where a testatrix devised a freehold estate to trustees upon trust, to sell and to pay 140*l.*, part of the proceeds, to A., and the residue of the proceeds to B., and appointed the devisees in trust her executors :—

Held, that in a suit by A. and her husband against the trustees, for payment of the 140*l.*, the latter were not entitled to set off the damages or costs of an action, brought by them as executors against the husband, to recover a deposit note in the hands of the wife, forming part of the testatrix's estate.

The will authorised the devisees in trust to give receipts :—
Held, that the cestui que trust of the proceeds, after payment of 140*l.*, was an unnecessary party, and the bill was dismissed as against him, with costs.

THIS was a question of set off.

A testatrix named Reddish had, in 1839, deposited with Messrs. Alexander & Co. of Needham-market, bankers, a sum of 65*l.*, for which she took from them a deposit note. Of this sum, 40*l.* remained due to her at the time of her death, and the deposit note was then in the hands of one of the plaintiffs, a niece of the testatrix, who claimed to retain it, as a gift to her from the testatrix, made during the lifetime of the latter.

The testatrix by her will, dated May 4, 1842, devised unto her nephews, Thomas Richer and William Merrington, two of the defendants, and their heirs, all her hereditaments at Combs, in the county of Suffolk, upon trust that they, the said Thomas Richer and William Merrington, or the survivor of them, or the executors or administrators of such survivor, should, as soon as conveniently could be after her decease, sell and dispose of the same; and the testatrix thereby gave and bequeathed the sum of 140*l.*, part of the monies arising from such sale, unto Elizabeth Richard Reeve, one of the plaintiffs, then Elizabeth Richard Keeble, and the residue and remainder thereof, after payment of the expenses incident to such sale, to her brother, John Richer, another of the defendants; and in case he should die in her lifetime, then she gave and bequeathed such residue unto all and every the children of her said brother, in equal shares and proportions (to be vested interests at her decease), as tenants in common; and she directed and declared, that the receipt and receipts of said Thomas Richer and William Merrington, and the survivor of them, and the executors or administrators of such survivor, should be a good receipt and discharge to the purchaser and the purchasers of her said hereditaments, and that such purchaser or purchasers should not be liable to see to the application

thereof, or be answerable or accountable for the misapplication or non-application of the same.

The plaintiff, Elizabeth Reeve, in July, 1843, inter-married with the other plaintiff, William Reeve; but no settlement or provision whatever was at any time made upon her, nor had the plaintiff, William Reeve, the means of making any settlement or provision for her. The testatrix died on Feb. 17, 1845; and, shortly afterwards, the trustees conveyed the devised estate to John Richer, the residuary devisee, on his paying to them the legacy of 140*l.*, made payable by the will out of the proceeds of the estate.

On application being made to the trustees on behalf of the plaintiffs for payment of the legacy of 140*l.*, the trustees required the deposit note to be delivered to them, disputing that it was a gift to Mrs. Reeve, who had not been able to obtain payment of the amount from the bankers, for want of an indorsement on the note.

In April, 1846, the executors brought an action of trover against Mr. Reeve for the deposit note, and recovered 42*l.* damages, subject to be reduced to 40*s.* on delivery up of the note. The executors had, before the filing of the bill, offered to pay the legacy, deducting therefrom the costs of the action.

In November, 1846, the present bill was filed by Mr. and Mrs. Richer against the trustees and Mr. John Richer as defendants, stating in substance to the effect above mentioned, and charging, that whether Mr. Reeve was or was not entitled to the note, the same had no reference to or connexion with the payment of the legacy of 140*l.* out of the monies which had arisen from the sale of the hereditaments at Combs; and that, under the circumstances aforesaid, and inasmuch as no provision whatever had been made for Mrs. Reeve, either upon or subsequent to her marriage, the 140*l.* bequeathed to her ought to be settled

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rington, might be ordered to pay the amount of the suit.

The defendant, John Richer, disclaimed.

The sum admitted by the trustees to be applicable to the payment of the legacy had court, and the deposit note had been delivered

Mr. *Russell* and Mr. *Taylor*, for the plaintiff, was no ground for setting off any part of the costs in the action; for, in the first place, she claims the 140*l* from the trustees in their character as devisees in trust, as her proportion of the profits of the devised estate, and makes no claim as to their character of executors.

In the next place, the amount sought to be paid is from the husband, whereas the 140*l* is due to the wife. See *Ranking v. Barnard (a)*, which may be cited in support of this point, the wife had died, and the amount was paid to her estate. The Vice-Chancellor saying, that, as the wife had died, and the amount was paid to her estate, the amount claimed by the plaintiff, in asserting her claim for a provision, the legacy became the property of the husband if there was no bankruptcy. *Carr v. Taylor (b)* is an express authority in the plaintiff's favour on this question; for in that case the Vice-Chancellor refused to set off a debt of the husband against the legacy to the wife, saying, "He could not sue for it against her: and if he had obtained a decree against her, it would not have been a debt of the husband against the wife."

there can be no set-off for the debt of the husband." [The Vice-Chancellor referred to *Foden v. Finney* (a).]

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It cannot make any difference that the legacy here is less than 200*l.*; for the course taken by the Court, in permitting sums under 200*l.*, belonging to the wife, to be paid into the hands of the husband, is a mere rule of practice, established by the Orders of February 10, 1806, and does not affect the principles applicable to the case (b). Indeed, the order itself authorizes the Court to make the sum, in such a case, payable either to the husband or the wife. [They also referred to *Cherry v. Boulbee* (c).]

With regard to setting off the costs of the action, *Wright v. Mudie* (d) is decisive; for there the Court refused to set off against the defendant's costs, in a bill of discovery, the costs due from that defendant to the plaintiff, in an action to which the bill of discovery was ancillary, and which it was the means of defeating.

Mr. Toller, for the defendants.—In *Carr v. Taylor* (e) the point was not raised, which was discussed in later cases, as to setting off the debt due from the husband against the surplus, after satisfying the wife's equity to a settlement. That point arose in the cases of *Ranking v. Barnard* (f), and *Ex parte O'Ferrall* (g). It is true, that, in the former of these cases, the wife had died, but that could make no difference. The Vice-Chancellor said, in that case, "the legacy, being discharged of the equity, would have become the absolute property of the husband;" shewing his opinion to be, that, subject to the equity, the legacy could be set off against the husband's debt. These cases supply what was left undecided in *Carr v. Taylor*, namely, the law as to the application of the surplus, after providing for the

(a) 4 Russ. 428.

(e) 10 Ves. 574.

(b) Beames' Orders, 464.

(f) 5 Mad. 32.

(c) 4 My. & Cr. 442.

(g) 1 G. & J. 347.

(d) 1 S. & S. 266.

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wife's equity. In *MacMahon v. Burchell* (a), the Vice-Chancellor *Wigram*, observed, "I am reported to have said, that a legacy to a wife could not be set-off against the debt of the husband. My meaning must have been, that there could be no such set-off in this case, to the prejudice of the wife's equity (if any) to a settlement." *Jones v. Mossop* (b) and *Hall v. Hill* (c) also contain dicta in favour of the defendants. In the latter Sir *Edward Sugden* says, "If the husband of a female legatee is indebted to the testator, the Court will make the husband of the legatee set off the debt against the legacy." And again, "What would have been the case, if the husband had died in the lifetime of the wife? Would not the wife have been entitled to the legacy so bequeathed to her? Nevertheless, in the cases to which I have referred, the probability of this occurrence was not considered a sufficient reason why, both having survived, the Court should not make the husband pay the debt to the estate out of the legacy to the wife."

With regard to the defendant John Richer, it was unnecessary to make him a party, there being a valid receipt clause in the will. Order XXX. of August 26, 1841. He ought not, after disclaiming, to have been brought to the hearing, and is entitled to his costs.

Mr. *Russell*, in reply.—The defendants have not succeeded in shewing that the interest devised to the wife can be set off against the demand due from the husband. It is, however, unnecessary to go into that question at all, because the first argument addressed to the Court, as to the 140*l.* being payable only out of the real estate, remains unanswered. Suppose there were a specific bequest of leaseholds, could it be withheld until the legatee restored a chattel forming part of the testator's estate?

(a) 5 Hare, 325.

(b) 3 Hare, 568.

(c) 1 D. & W. 109.

The VICE-CHANCELLOR :—

1847.
REEVE
v.
RICHER.

I am of opinion that it was unnecessary to make John Richer a party to the suit, and that the bill must be dismissed, as against him, with costs.

With regard to the other defendants, the action in question was an action of trover, brought by the plaintiffs-at-law expressly as executors, not in their own right, and they are not liable, as executors, for the sum demanded by the bill, which was given by the testatrix out of a portion of her real estate only. How the case would have stood, had those circumstances not existed, I need not say. In addition, there is here the circumstance that, the deposit note having been given up, the damages for which the judgment is recovered, independently of costs, are 40s. only—in fact, nominal damages; and the defendant John Richer, who is beneficially entitled to the real estate charged by the will with the 140*l.*, is not, as I understand, interested in the testatrix's residuary personal estate. But there is, moreover, the fact that the gift by the will of the 140*l.* was to the wife (whose marriage took place between the will and the death) while the action was, and the judgment is, against the husband alone, and the wife is living as well as the husband.

I think that, in the present case, a set-off or deduction cannot be allowed to the defendants, the trustees.

The bill was dismissed with costs, as against the defendant John Richer; and the defendants Thomas Richer and William Merrington were ordered to pay to the plaintiffs, or either of them, the sum of 140*l.*, with interest from February 16, 1846, at 4*l.* per cent., after allowing the sum paid into court, and to pay the costs of the plaintiffs.

1847.

Nov. 11th.

LAY v. PRINSEP.

An affidavit of service of a copy of a bill is insufficient, if it omit in the title the name of one of the parties, although no process is prayed by the bill against such party.

MR. DANIELL moved for leave to enter a memorandum of service of a copy of the bill under the 25th Order, August, 1841. The only question was, whether the affidavit of service was sufficient, there being omitted, in the title of it, the name of a defendant against whom no process was prayed.

The VICE-CHANCELLOR held that the affidavit was insufficient, and made no order.

Nov. 12th.

ROBINSON v. BELL.

Quere, whether the circumstance of an administrator ad litem being made a defendant to an administration suit, is sufficient to satisfy the Court that there are no personal assets, and to warrant a decree being made at once against the real estate, without the usual preliminary accounts of the personal estate.

THIS was a creditors' suit, seeking to have the real estates of a testator, named Alexander Tiplady, applied in payment of his debts, including a debt secured for the benefit of the plaintiffs, by an indenture dated March 16th 1814, and made between the testator of the one part, and a trustee named Bryan Robinson of the other part, whereby, after reciting that a marriage had been some time since solemnised between the testator and Jane Minikin, widow of John Minikin deceased, and formerly widow and relict of Stephen Robinson deceased, and that, the testator having received a considerable personal estate, his said widow was desirous of making some provision for John Robinson and Stephen Robinson, the plaintiffs, her sons by her first

But where the plaintiffs, in such a suit, were persons who could obtain general administration, *Held*, that, in such a case, the personal estate was not sufficiently represented by an administrator ad litem.

And where it did not appear upon the bill, that the administration was so limited, and no objection for want of parties was taken by the answer, the Court did not make a decree saving the rights of absent parties, under the 11th Order of August, 1841, but allowed the objection when made at the hearing, and gave leave to amend.

marriage, the testator covenanted with Bryan Robinson, his executors and administrators, to pay him, his executors, administrators, or assigns, 500*l.* at the end of twelve months after the death of his said wife ; and it was thereby declared, that Bryan Robinson, his executors, administrators, and assigns, should stand possessed of the 500*l.* on certain trusts thereby declared for the benefit of the two plaintiffs, John Robinson and Stephen Robinson, and their children.

The testator, by his will, dated the 9th of March, 1818, duly executed for passing freehold estate, after charging all his property with the payment of his funeral and testamentary expenses and debts, gave and bequeathed all his personal estate to his wife (except certain specific parts thereof, which he thereafter bequeathed to his daughter, Alice Tiplady, afterwards Alice Bell) ; and the testator devised unto Edward Tomlinson and Edward Rawlinson and Thomas Tunstall Picard, and their heirs, all his real estate, upon certain trusts therein mentioned, for the benefit of Jane Tiplady his wife ; and, after her decease, in trust to pay the rents and profits of the said real estate to his daughter, Alice Tiplady, afterwards Alice Bell, during her life ; and, after her decease, in trust, that the trustees should sell the estates as therein mentioned, and pay and apply the proceeds amongst the lawful issue of his said daughter, Alice Tiplady, afterwards Alice Bell, when they should respectively attain their age of twenty-one years, share and share alike, as therein mentioned, and should, in the meantime, apply the income for their maintenance and education. And the testator appointed his wife sole executrix of his will. He died in 1822. His widow proved the will, and died in 1840, leaving Alice Bell, and four children of Alice Bell, all of whom were defendants, her surviving.

Letters of administration to her estate were granted to the plaintiff, Stephen Robinson.

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ROBINSON
v.
BELL.

1847.
ROBINSON
v.
BELL.

All the trustees of the will had died except Edward Tomlinson.

The plaintiffs attained the age of twenty-one during the lifetime of the testator's widow.

The trustee, Bryan Robinson, had died, and Jane Robinson (his sister and executrix) had proved his will.

The bill, which was filed by John Robinson and Stephen Robinson against Mr. and Mrs. Bell and their children, Mr. Tomlinson and Mrs. Jane Robinson, charged, that there were no personal assets of the testator, the whole having been long ago applied by his widow and executrix in payment of his debts; and the prayer was, that the testator's real estate might be applied in payment of the debt of 500*l.*, and the interest due thereupon.

Letters of administration to the testator, limited to the purposes of the suit, had been granted to Jane Robinson; but this was not so alleged in the bill, which stated that administration de bonis non had been granted to one of the plaintiffs.

The answers raised no objection to the suit for want of parties, or on account of the insufficiency of the personal representation to the testator.

Mr. *Russell* and Mr. *Phillips* appeared for the plaintiffs.

Mr. *Wigram* and Mr. *Stinton*, for the parties interested in the real estate, took a preliminary objection, that there was no general representative of the testator a party to the suit.—[The *Vice-Chancellor*.—You have not, in your answer, taken any objection for want of parties. May not the Court make a decree saving the rights, if any, of absent parties, under the recent Order (a) ?]—Our objection is, that our remedies against absent parties are not provided for in this suit, not that there are any rights of absent parties which can be saved.

(a) 11th Order, 26th August, 1841.

His Honor permitted the argument in support of the objection to proceed.

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ROBINSON
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Mr. *Wigram* and Mr. *Stinton*, in support of the preliminary objection. The limited administration which has been taken out by Miss Robinson does not constitute her the testator's legal personal representative, for the purpose of enabling the Court to make a decree for the sale of the real estate. There must be before the Court, for that purpose, a complete legal personal representative. It will be argued, that a limited administration enables the Court to declare the liability of the real estate, if it go no further. But that is not sufficient. The suit must be so constituted that complete justice can be done. No precedent can be found of a decree in which the real estate has been declared liable without the accounts having been taken of the personal estate. This is requisite not merely for the purpose of substantiating a claim against the real estate, but for the purpose of administering the personal estate before any part of the real estate is applied. And it is clear, that the personal estate could not be administered, and that the accounts could not be taken, with merely a limited administrator before the Court. Suppose a debt of 3000*l.* were outstanding, a limited administrator could not be directed to get it in. The whole question is, whether the decree is not to be taken in the ordinary form, according to the usual practice of the Court. Among many inconveniences which might be suggested as likely to arise from a departure from that practice, one is, that a decree not directing the ordinary accounts, would afford no ground for staying another creditor's suit. In *Knight v. Knight* (a), the Lord Chancellor said—"It is true, that at law the creditors may sue the heir only where he is expressly bound, but equity is otherwise. On the contrary, in equity, the creditors may

(a) 3 P. W. 331.

1867.
LAWSON
1867.

All the trustees of the will had died & were deceased.

The plaintiffs attained the age of twenty-one years of the testator's widow.

The trustee, Peter Richardson, had died, leaving his sister and executrix and proved.

The bill which was filed by John Richardson, executor, against Mr. and Mrs. Bell and the Trustees and Mrs. Jane Richardson, charged that the personal assets of the testator had been long ago applied by his widow and executor to his debts, and the prayer was that the real estate might be applied in payment of the same and the interest due thereupon.

Letters of administration to the testator for purposes of the suit had been granted to the plaintiffs, but this was not so alleged in the bill, which administration de bonis non had been granted to the plaintiffs.

The answers raised no objection to the parties, or on account of the insufficiency of representation to the testator.

Mr. Russell and Mr. Phillips appeared for the defendants.

Mr. Wigram and Mr. Stinton, for the plaintiffs in the real estate, took a preliminary objection that there was no general representative of the testator in the suit.—[The Vice-Chancellor.—You have answered, taken any objection for want of parties?—The Court make a decree saving the rights of absent parties, under the recent Order (a) ?]—The Vice-Chancellor said, that our remedies against absent parties were provided for in this suit, not that there are absent parties which can be saved.

(a) 11th Order, 26th August, 1867.

His Honor permitted the argument in support of the objection to proceed.

1847.
ROBINSON
v.
BELL.

Mr. Wigram and Mr. Stinton, in support of the preliminary objection. The limited administration which has been taken out by Miss Robinson does not constitute her testator's legal personal representative, for the purpose of enabling the Court to make a decree for the sale of the real estate. There must be before the Court, for that purpose, a complete legal personal representative. It will be argued, that a limited administration enables the Court to declare the liability of the real estate, if it go no further. But that is not sufficient. The suit must be so constituted that complete justice can be done. No precedent can be found of a decree in which the real estate has been declared liable without the accounts having been taken of the personal estate. This is requisite not merely for the purpose of substantiating a claim against the real estate, but for the purpose of administering the personal estate before any part of the real estate is applied. And it is clear, that the personal estate could not be administered, and that the accounts could not be taken, with merely a limited administrator before the Court. Suppose a debt of 3000*l.* were outstanding, a limited administrator could not be directed to get it in. The whole question is, whether the decree is not to be taken in the ordinary form, according to the usual practice of the Court. Among many inconveniences which might be suggested as likely to arise from a departure from that practice, one is, that a decree not directing the ordinary accounts, would afford no ground for staying another creditor's suit. In *Knight v. Knight (a)*, the Lord Chancellor said—"It is true, that at law the creditors may sue the heir only where he is expressly bound, but equity is otherwise. On the contrary, in equity, the creditors may

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sue both the heir and the executor, which they cannot do at law; so that the rules at law and equity are different. The natural fund for the payment of debts is the personal estate, and this ought to go in ease of the land. It does not appear, in the principal case, but that the executor or administrator may have made satisfaction to the plaintiff for the breach of this covenant, which the executor might have disclosed to the Court, had he been party to the bill. Now a Court of equity in all cases delights to do complete justice, and not by halves, as, first to decree the heir to perform this covenant, and then to put the heir upon another bill against the executor, to reimburse himself out of the personal assets, which, for ought appears to the contrary, may be more than sufficient to answer the covenant. And where the executor and heir are both brought before the Court, complete justice may be done, by decreeing the executor to perform this covenant, as far as the personal assets will extend; the rest to be made good by the heir, out of the real assets. And here appears no difficulty or inconvenience in bringing the executor before the Court. On the contrary, it would prevent a multiplicity of suits, which a Court of equity ought to do; wherefore, allow the demurrer." [They relied also upon *Clough v. Dixon* (a), *Croft v. Waterton* (b), and *Davis v. Chanter* (c).]

Mr. Russell and Mr. Phillips, for the plaintiffs.—The suit is correctly constituted according to the rule as laid down by Lord Redesdale (Mitf. 177, 4th. ed.):—"Where there has been no general personal representative, a special representative by an administration limited to the subject of the suit has been required. In other cases, where a demand is made against a fund, entitled to exoneration by general personal assets, if there are any such,

(a) 10 Sim. 564.

(b) 13 Sim. 653.

(c) 14 Sim. 212.

a like limited administrator is frequently required to be brought before the Court. This seems to be required, rather to satisfy the Court, that there are no such assets to satisfy the demand; for, although the limited administrator can collect no such assets by the authority under which he must act, yet, as the person entitled to general administration must be cited in the Ecclesiastical Court, before such limited administration can be obtained, and as the limited administration would be determined by a subsequent grant of general administration, it must be presumed that there are no such assets to be collected, or a general administration would be obtained."

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The reasoning in this passage completely meets the arguments adduced in support of the objection. *Clough v. Dixon*(a) is not inconsistent with the law so laid down, for, in that case, the Vice-Chancellor proceeded on the ground, that the object of the suit was, to determine the plaintiff's share of the residuary estate of the testatrix, which could not be done, unless the estate of a deceased personal representative was fully represented, so that what was coming from that estate could be ascertained. The case merely proceeds upon the right of the defendant to have the claim made conclusively dealt with, and disposed of in the suit, as regards himself.

Now apply that criterion to this case. Would the parties interested in the real estate be liable to be assailed in respect to this claim in any other proceeding? It is clear they would not. The debt would be conclusively established by the decree in a suit to which the limited administrator is a party. If any personal assets should be discovered hereafter, the decree in the present suit will entitle the defendant to recover them from the personal representative, to the full extent of what he has paid, without proving the validity or extent of the demand in respect of which the payment has been made.

(a) 10 Sim. 564.

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The facts of the case of *Croft v. Waterton* (a) are not sufficiently stated to shew how the question arose. And *Davis v. Chanter* (b) has no application. On the other hand, in *Faulkner v. Daniel* (c), Vice-Chancellor Wigram says: "The state of the authorities make it proper that I should express myself with great caution on the point I am now considering. In principle, I think it is clear, that, where a limited administration is granted by the proper Ecclesiastical Court, and the limited administrator is made a party to a cause, the estate of the deceased is perfectly represented for all purposes, to the extent of the authority conferred by the letters of administration; a Court of exclusive jurisdiction has power to grant letters of administration, and to whatever extent that Court grants administration, to that extent the estate will be represented in any suit to which the administrator is a party. It is not inconsistent with this, to say, that, if the administration granted be more limited than the purposes of the suit require, and it is in the power of the plaintiff to obtain a general or more extensive representation, the Court may require the plaintiff to do the utmost he can to make the suit perfect, by obtaining a representation commensurate with the objects of the suit, or as nearly so as the practice of the Ecclesiastical Court will enable him; but if the plaintiff has obtained an administration as extensive as the practice of the Ecclesiastical Court will give him, I cannot, without the clearest authority, admit that the suit is not properly constituted, especially in a case in which the parties who take the objection might themselves obtain a more general representation. The passage in Lord Redesdale's Treatise (d), the case of *Brant v. King* (e), the opinion of Sir Herbert Jenner, in *Cav-*

(a) 13 Sim. 653.

(b) 14 Sim. 212; and see 15 Sim. 93 and 2 Ph. 545, on appeal.

(c) 3 Hare, 207.

(d) Pp. 176, 177, 178, 4th ed.

(e) 1 Williams on Executors, 409, 3rd ed.

Thorn v. Chalie (a), and the cases in the Ecclesiastical Reports, *In the goods of the Elector of Hesse* (b), *Harris v. Milburn* (c), and *Wooley v. Gordon* (d), appear to me to be the authorities in accordance with the principle I have stated; and there is nothing, in the cases of *Moore v. Choat* (e) and *Clough v. Dixon* (f), inconsistent with that principle."

In *Cave v. Cork* (g) an objection was taken before your Honor similar to that now urged, but was not acceded to. And in *Ellice v. Goodson* (h) your Honor inquired whether it was meant to be contended, that an administrator ad litem could not effectually enter into the question whether the estate of the deceased was indebted, and to what amount, and could not be a party to an adjudication as to the claim on that personal estate; and your Honor's judgment decides the question in the affirmative, without taking it to be material whether the letters of administration did or did not authorise the administrator to collect all or any of the accounts.—[The Vice-Chancellor.—Was *Davis v. Chanter* cited to me there?—It was not then reported, and was not referred to. But we submit, that it would not have altered your Honor's judgment, especially as there was an appeal from the decision, which is now waiting for judgment (i). And in *Moore v. Choat* (k), the Vice-Chancellor of England himself would not accede to such an objection, but allowed the demurrer in that case on other grounds. *Knight v. Knight* (l) is no authority against the plaintiffs, for the rule is put there entirely on the ground of convenience; and the objection which existed in that

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(a) 2 S. & S. 127.

(b) 1 Hagg. 93.

(c) 2 Hagg. 62.

(d) 3 Phillim. 315.

(e) 8 Sim. 508.

(f) 10 Sim. 564.

(g) 2 Y. & C. C. C. 130.

(h) 2 Coll. C. C. 4.

(i) Since decided in favour of the sufficiency of the administration ad litem. See 2 Ph. 548.

(k) 8 Sim. 508.

(l) 3 P. W. 331.

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here are two of the next of kin of the deceased executrix, who was the sole residuary legatee, and was also, in equity, a creditor of the deceased testator.

What I should have thought it right to do, if I had been satisfied that the plaintiffs could not obtain general letters of administration, it is not necessary for me to say; for this case comes before me in a form in which I think myself bound to say, that the plaintiffs could have obtained, and can now obtain, general administration de bonis non of the testator: and this being so, I think that I ought to accede to the objection, especially considering the recent authorities in another branch of the Court, which have been cited in the argument.

The case stood over, with liberty to amend the bill, and the costs were reserved.

The suit was afterwards compromised.

Nov. 13th.

OCKLESTON v. HEAP.

Where a testator devised estates to trustees, their heirs and assigns, on certain trusts, and the surviving trustee devised the trust estates upon the same trusts on which he held the same, *Held*, that the cestui que trustent were entitled to have new trustees appointed of the original will.

WILLIAM FAIRHURST, by his will, dated the 22nd of February, 1839, appointed his son-in-law George LAW, and his friend Edward TILSTON, his co-executors and trustees, and gave, devised, and bequeathed all his real and personal estate and effects, subject to certain bequests thereinbefore made, unto and to the use of his said trustees, their heirs, executors, administrators, and assigns, according to the nature and tenure thereof, upon trust, as to such part thereof as he held in mortgage or trust, or subject to any equity, to carry into effect the trusts thereof; and as to the residue of his said real and personal estate, to sell and dispose thereof, at their discretion; and he declared, that the purchasers of his said estate should not be bound to see to the application of the purchase money,

and "that the receipts of my trustees, or the survivor, shall be in all cases sufficient" (a); and as to the proceeds of his said estate, the testator gave and devised the same unto and equally amongst his three daughters, with limitations over in favour of their husbands and children.

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OOCKLESTON
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HEAP.

The will contained no power to appoint new trustees.

The testator died on the 1st of March, 1839.

On the 3rd of May, 1839, George Law alone duly proved the will.

Edward Tilston, by a deed poll, under his hand and seal, bearing date the 25th of the same month of June, 1839, duly renounced the executorship of the will, and disclaimed the trusts thereby declared, and all estate, right, title, and interest bequeathed to him by the will.

George Law, by his will, dated the 14th of February, 1847, gave, devised, and bequeathed all mortgages in fee and trust estates, which might be vested in him at the time of his decease, unto and to the use of Samuel Taylor and Joshua Heap, their heirs, executors, administrators, and assigns, upon the trusts, and subject to the equities affecting the same respectively, to the intent that the same might be disposed of as the rules of law and equity might require; and he appointed Samuel Taylor and Joshua Heap, together with his wife, his executors and executrix.

George Law died on the 4th of February, 1847, and his will was proved on the 29th of March, 1847, by Joshua Heap alone.

The suit was instituted by parties beneficially entitled, under the will of William Fairhurst, against Samuel Taylor, Joshua Heap, and Amelia Law, and prayed that it might be referred to the Master, to appoint three or some other number of fit and proper persons, to be trustees, under that will, in the place and stead of George

(a) These were the words of the will.

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Law, deceased, and Edward Tilston, and that the defendants, Joshua Heap, Samuel Taylor, and Amelia Law, might be severally directed to execute and do, and to join in executing and doing, such deed or deeds, instrument or instruments, and other acts, as might be necessary for conveying and transferring, and paying over the trust estate to such new trustees when appointed.

Mr. Bacon and Mr. J. V. Prior, for the plaintiffs, cited *Cooke v. Crawford* (a), and submitted that there was sufficient doubt of the competency of the devisees under the will of the deceased trustee, to act in the trusts, to render it proper to appoint new trustees; and that the point had been recently so decided in *Mortimer v. Ireland*, not reported (b).

Mr. Russell and Mr. Bagshawe, for one of the devisees under the will of the trustee who objected to being removed.—Neither in *Cooke v. Crawford* (a), nor in *Mortimer v. Ireland* (b), was there any limitation to the assigns of the trustees. That limitation occurred in *Titley v. Wolstenholme* (c), and was held sufficient to shew that the testator intended the trust to pass to the devisee of the trustee.

Mr. Rasch appeared for one of the defendants, Amelia Law, and referred to *Bradford v. Belfield* (d) and *Townsend v. Wilson* (e), and contended, that there was no case for the removal of the devisees of the surviving trustee.

The VICE-CHANCELLOR:—

What I should have done, if *Titley v. Wolstenholme* had come before me, I need not say, nor am I sure. I think that, in the present case, there must be a decree for the appointment of new trustees in the usual form.

(a) 13 Sim. 91.

(d) 2 Sim. 264.

(b) Since reported, 6 Hare, 196,
and on appeal, 11 Jur. 721.

(e) 1 B. & Ald. 608, and 3
Madd. 261.

(c) 7 Beav. 425.

1847.

IN THE MATTER OF MILLS.

Dec. 8th.

BY an order dated the 14th of June, 1847, made on the petition of the executors of William Mansfield, deceased, to the Master of the Rolls, the usual order was made for the delivery of his bill of costs against them, as such executors.

The bill of costs, amounting to 6*l.* 19*s.* 6*d.*, having been accordingly delivered, was paid on the 3rd of December, 1847.

Mr. *Bates* now moved for an order, directing Mr. *Mills* to deliver to the executors all documents in his custody or power, belonging to the executors.

The affidavits in support of the motion disclosed the order made at the Rolls.

An order was made at the Rolls for the delivery by a solicitor of his bill of costs, which was accordingly delivered and paid. Any subsequent application for the delivery of deeds and documents of the client, in the solicitor's possession, should be made to the Rolls, and not to any other branch of the Court.

Mr. *Malins* referred to the 6 & 7 Vict. c. 73, s. 37. He objected, that the former order having been made at the Rolls, this motion could not be made before his Honor, but must be made at the Rolls.

The VICE-CHANCELLOR held that the application should be made at the Rolls, and refused the motion, with costs (*a*).

(*a*) The Master of the Rolls, one of the clerks of Records and whose opinion was asked at his Writs, concurred in his Honor's Honor's request, by Mr. Berrey, opinion.

1547.

Nov. 17th.

WORTHAM v. PEMBERTON.

NEWESHAM v. PEMBERTON.

In a bill, purporting to be exhibited by an infant plaintiff by her next friend, she was described by her maiden name, but was, in fact, clandestinely married. The Court refused a motion made on behalf of her husband (a defendant), to have the bill taken off the file.

The estate of a feme covert, tenant in tail in possession, subject to a jointure term, is equitable during the continuance of the term, for the purpose of entitling her to a settlement, on a bill filed by her.

And the Court directed a settlement, although the bill did not expressly pray to that effect.

BY indentures of lease, release, and appointment, dated the 14th and 15th of August, 1828, made between Mary Wortham, of the one part, Christopher Pemberton and John Hawkins, of the other part, certain freehold estates in the parishes of Bassingbourne and Connington, in the county of Cambridge, were limited to the use of Henry Hawkins for life, with remainder to the use of Christopher Pemberton and John Hawkins during the life of Henry Hawkins, on trust to preserve contingent remainders, with remainders, as to the estate at Connington, after limitations in favour of Francis Wortham and of his sons, none of which took effect, to the use of the daughter or daughters of Francis Wortham, in tail, (if more than one, as tenants in common), with divers remainders over. And it was provided, that it should be lawful for Henry Hawkins to charge the estates with a rent-charge, by way of jointure for his wife, not exceeding 400*l.* a year, and to limit the estates to any person or persons for any term of years, to secure such jointure, upon such trusts for better securing the payment of such yearly rent as to him the said Henry Hawkins should seem meet. And it was provided, that, if any such jointure should take effect, and there should be a failure of issue of Henry Hawkins, so that the estates at Bassingbourne and Connington should go to separate uses, then 200*l.* should be charged on the Bassingbourne estate, and 200*l.* on the Connington estate.

By an indenture of November 13th, 1829, made between Henry Hawkins, of the first part, Maria Eleanor Osborne, of the second part, and George Osborne, John Dick Burnaby, William Hawkins, and Ernest Hawkins, of the third part, being a settlement made in contemplation of the marriage of Henry Hawkins and Maria Eleanor Osborne,

Henry Hawkins, in exercise of the powers contained in the former deed, charged the estates with a rent-charge of 400*l.* per annum, to take effect and commence from his decease, and during the life of his wife. By the same indenture he limited and appointed the estates to the use of George Osborne, John Dick Burnaby, William Hawkins, and Ernest Hawkins, their executors, administrators, and assigns, for 200 years, to commence from his death, upon trust for better securing the due and regular payment of the rent-charge of 400*l.*, thereinbefore limited and appointed to Maria Eleanor Osborne; but, nevertheless, to permit and suffer the person or persons who should, for the time being, either at law or in equity, be entitled to the immediate reversion, freehold, and inheritance of the said manors, messuages, hereditaments and premises expectant on the determination of the said term of 200 years, to enjoy, receive, and take the rents, issues, and profits of the same premises, to and for his, her, and their own use and benefit, until default should happen to be made of or in payment of the said annual sum, or yearly rent-charge of 400*l.* thereby limited, or some part thereof, at the times and in manner thereinbefore mentioned and appointed for payment thereof. And upon further trust, in case the same annual sum or yearly rent-charge, or any part thereof, should happen to be behind or unpaid by the space of two calendar months next over or after any of the said days or times whereon the same should be or become payable by virtue of that deed, then, and so often, (and although no formal demand should have been made of such annual sum or yearly rent-charge, or of the arrears thereof,) that the said trustees, and the survivors and survivor of them, his executors or administrators, should from time to time, as often as the case should so happen, by and out of the rents, issues, and profits of the same manors, messuages, lands, hereditaments, and premises, or by demising, leasing, or mortgaging the same, or a competent part thereof, for and during all or any part of the said term of 200 years,

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or by bringing actions against all or any of the tenants or occupiers of the same premises, for recovering the rents then in arrear, or such other ways or means as to the said George Osborne the younger, John Dick, Burnaby William Hawkins, and Ernest Hawkins, or the survivors or survivor of them, his executors or administrators, should seem meet and necessary, raise and levy such sum and sums of money as should be sufficient from time to time to pay and satisfy the said annual sum, or yearly rent-charge of 400*l.*, or so much thereof as should from time to time during the continuance thereof happen to be in arrear and unpaid, together with such costs, charges, damages, and expenses as the said Maria Eleanor Osborne or her assigns, or the said trustees or their respective executors or administrators, or any of them, should sustain, expend, or be put unto, for or by reason of the non-payment of the same annual sum or yearly rent-charge, at the days and times, and in manner thereinbefore in that behalf mentioned; and should apply the monies so to be raised accordingly; and should permit and suffer the person or persons for the time being entitled, either in law or equity, to the immediate reversion, freehold, or inheritance of the same manors, messuages, hereditaments, and premises, expectant on the determination of the said term of 200 years, to receive and take the clear residue or surplus of the rents, issues, and profits of the same manors, messuages, lands, hereditaments, and premises, which should from time to time remain, after paying and satisfying the said annual sum or yearly rent-charge of 400*l.* and all arrears thereof, and all costs, charges, and expenses attending the execution of the trusts thereinbefore mentioned, for his, her, and their own use and benefit. And it was thereby further agreed and declared, that upon the death of the said Maria Eleanor Osborne, and the payment of the arrears of the said rent-charge, and when and so soon as the costs, charges, and expenses of the trustees respectively, their respective executors, administrators, and as

signs, incident to the execution of the same trusts, should be fully paid, reimbursed, and satisfied, then and immediately thenceforth, the said term of 200 years, as to such of the said manors, messuages, lands, and other hereditaments therein comprised, as should not have been sold, mortgaged, or otherwise disposed of for the purposes aforesaid, should absolutely cease and determine; and, as to such of the same manors, messuages, lands, and other hereditaments as should have been sold, mortgaged, or otherwise disposed of as last mentioned, should, subject and without prejudice to every or any such sale, mortgage, or other disposition, wait upon and attend the reversion, freehold, and inheritance of the premises expectant on the said term.

Henry Hawkins died, leaving a widow but no child. Francis Wortham had previously died, leaving one daughter only, who was the plaintiff in the cause, and the tenant in tail of the estates subject to the jointure term.

On December 15th, 1843, the plaintiff, being an infant, filed the bill, by her mother and next friend, against Christopher Pemberton and John Hawkins, stating to the above effect, except that the last of the above-mentioned indentures was not therein noticed; and further stating, that the plaintiff was born on December 24th, 1828, and that, above two years before the death of the plaintiff's father, a person named William Burton Newenham came to lodge with the plaintiff's father and mother, who were then in straitened circumstances; and that, on October 13th, 1843, he enticed the plaintiff away with him from the protection of her mother, nor could her mother discover what had become of her, except that, by a letter, she alleged that she was married; and the prayer was for an account of the rents and profits of the plaintiff's real estates received by the defendants, and for a guardian, and maintenance, and a receiver, and that such proceedings might be taken as the Court should think fit in reference to the abduction of the plaintiff and her alleged marriage.

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On December the 16th, 1843, the plaintiff, by her mother and next friend, presented a petition in the cause, stating the circumstances of the abduction of the plaintiff, and praying that William Burton Newenham might be ordered forthwith to deliver up the petitioner to Jane Wortham (her mother); and that he might be ordered, within two days after service of the order, to attend the Court and answer the matter of the petition; and that he might be restrained by injunction from all intercourse, personal or by correspondence or otherwise, with the petitioner; and that service of the order to be made on that application, and of the injunction on Newenham, at the Glo'ster Coffee-house, in Piccadilly, might be deemed good service; and that it might be referred to one of the Masters of the Court to inquire forthwith and certify, without delay, whether the petitioner had or had not contracted any valid marriage; that the usual directions might be made to the Master for the appointment of a guardian of the petitioner, with liberty for the mother to propose herself, and for an allowance for the plaintiff's past and future maintenance and education, having regard to the circumstances of her mother, and for a receiver.

The petition was heard December 18th, 1843, when it was ordered that Newenham should be restrained from the solemnisation of a marriage with the plaintiff, and from all intercourse, personal or by correspondence or otherwise, with her, until the further order of the Court; and that he should deliver up the plaintiff to Jane Wortham, her mother; and that he should personally attend at the sitting of the Court on the 22nd December, 1843; and that service of the order at the Glo'ster Coffee-house, Piccadilly, should be deemed good service on him; and in the meantime, it was ordered that the rest of the petition should stand over.

The petition being again on the paper on December 22nd, 1843, it was ordered, that Newenham should be committed to the Queen's Prison for his contempt in not obeying the order of the 18th December, 1843; and it was ordered that the petition should stand over in other respects.

On March 29th, 1844, another petition, presented by the plaintiff, by her next friend, came on to be heard, and the Court referred it to the Master to inquire, among other things, whether there had been any valid marriage between her and Newenham.

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The Master, by his report, dated February 20th, 1845, found that the infant plaintiff was the daughter of the late Francis Wortham, by Jane Wortham, his wife, and that she was born on the 24th day of December, 1828; that, from and after the decease of Francis Wortham, the plaintiff continued to reside with her mother, Jane Wortham, until the month of October, 1843; that, in or about the month of January, 1843, the plaintiff became seised, or otherwise well entitled, for an estate of inheritance in tail general, of or to a certain real estate, situate at Connington, in the county of Cambridge, consisting of freehold lands, containing, in the whole, 378 acres, or thereabouts, and copyhold lands, containing sixteen acres, or thereabouts, held of the manor of Fenstanton, and which estate was then in the occupation of James Mann, as tenant thereof from year to year, at the annual rent of 400*l.*; that, some time in, or previously to, the month of October, 1843, the plaintiff (being then in the fifteenth year of her age) became acquainted with William Burton Newenham, and that he pretended to take considerable interest in the affairs of herself and mother, and thereby gained considerable influence over them; that, on the 13th day of October, 1843, the plaintiff was taken away by William Burton Newenham from the residence of her mother, without her knowledge or consent, and conveyed by him to Gretna Green, in Scotland, and was there prevailed upon by William Burton Newenham to marry him, which she consented to do; that, on the 15th of October, 1843, William Burton Newenham and the plaintiff went to the house of John Linton at Gretna Green, and declared themselves single persons; that a marriage ceremony was there-

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upon performed between them by John Linton, in the presence of Jane Linton, the wife of John Linton, and one John M'Glashan; that, from the time of the marriage down to the 28th day of March, 1844, William Burton Newenham and the plaintiff cohabited and lived together as man and wife; and that, in the month of August, 1844, there was born a child, issue of the marriage; that, by the affidavit of George Moir, who was a barrister of twenty years standing, and practising in the Court of Session at Edinburgh, and conversant with the law of Scotland, as applied to questions of marriage contract, it appeared, that, by the law of Scotland, present consent, deliberately expressed, by parties capable of contracting, constitutes marriage, without the performance of any religious ceremony; and that, by the same law, females who have attained the age of twelve years are capable of consent to the marriage contract; and further, that the fact of the plaintiff's consent having been given was sufficiently evidenced by the attestations of the witnesses present. That, on or about the 28th of March, 1844, the plaintiff was restored to, and had ever since continued under the care of, Jane Wortham, her mother; that, on the 6th of May, 1844, William Burton Newenham was committed to her Majesty's gaol of Newgate upon a charge of felony, for taking away, from motives of lucre, the plaintiff, contrary to the statute made and passed in the ninth year of the reign of King George the Fourth, c. 31, s. 19; and that, at the ensuing sessions, held at the Central Criminal Court, two several indictments were preferred and found against him, one whereof was for felony, and the other for misdemeanor, under the 20th section of the same act, for having unlawfully taken the plaintiff, she being then an unmarried girl under the age of sixteen years, out of the possession and against the will of her mother; that the charge of felony against him was afterwards abandoned, the evidence being, as was alleged, insufficient to sustain such

charge; that, on the 17th of June, 1844, William Burton Newenham was tried at the Central Criminal Court under the indictment for, and was convicted of, the misdemeanor, and was sentenced to two years' imprisonment, which punishment he was then undergoing. And the Master, therefore, found, that there had been a valid marriage between the plaintiff Frances Louisa Wortham and William Burton Newenham, and that such marriage took place on the 15th of October, 1843; and he was of opinion, that it would not be fit and proper that any further or other proceedings should be taken against William Burton Newenham, or any other person, either under the act of Parliament of the ninth year of the reign of King George the Fourth, or otherwise; that, as to the fortune of the plaintiff, he found that the real estate of which she was so seised as tenant-in-tail general, as mentioned, constituted the whole of her fortune; and that such real estate was subject to and charged with the payment of a rent-charge or annual payment of 200*l.*, to one Mrs. Hawkins, for the term of her life; that the annual income arising from the estates, after deducting the rent-charge of 200*l.*, and the annual charge for land-tax, insurance, and repairs of the estate, amounted to the sum of 175*l.*, or thereabouts; and the Master then reported as to the proper amount of maintenance.

On the 22nd of February Newenham presented a petition in the cause, stating that, although aware of the existence of the order of December 16, 1843, he was not aware of the order of December 18, requiring him to attend at the sitting of the Court on December 22, until the month of February following; and further stating, that a valid marriage had been contracted between him and the plaintiff. The prayer was, that the petitioner might be discharged from the consequence of his contempt, and that he might not be detained in custody by the order of the Court after the expiration of his then imprisonment; that

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the order of the Court, dated 18th of December, 1843, might be discharged with costs, to be paid by the plaintiff's next friend personally; that the bill in the case *Wortham v. Pemberton* might be taken off the file, or that the proceedings in the cause might be stayed, with costs, to be paid by the next friend; and that the next friend might pay the costs of so much of the application as did not relate to the contempt of the petitioner.

1845.
 March 8th.

Mr. *Russell* and Mr. *Malins*, in support of the petition, contended that the bill was irregular, as appearing on the face of it to be filed without the plaintiff's consent, and by a wrong name, and that the order of commitment was also irregular. [They cited *Butler v. Freeman* (a).]

Mr. *Swanston* and Mr. *H. Prendergast*, for the plaintiff, referred to *Ball v. Coutts* (b), *Like v. Beresford* (c), and *Cooke v. Fryer* (d).

Mr. *Cole* appeared for the trustees.

The *Vice-Chancellor* said, that, if the argument for the petitioner prevailed, it would interfere materially with the power of the Court, by depriving infants of its protection where it was uncertain whether they were married or not. No case was made for taking the bill off the file on this ground, nor on that of its being filed without the consent of the infant. The contrary seemed to be the impression of the Master of the Rolls in *Cooke v. Fryer*. If the bill was not now regular, it might be rendered so by amendment.

The order was, that so much of the order of the 18th of December, 1843, as ordered that Newenham should deliver

(a) Amb. 303.
 (b) 1 V. & B. 300.

(c) 3 Ves. 508.
 (d) 4 Beav. 13.

up the said plaintiff, Frances Louisa Wortham, to her mother, should be discharged; and it was ordered that Newenham should be at liberty to have such correspondence, communication, and intercourse with the infant plaintiff as he would have been entitled to, according to law, if neither of the orders mentioned in the petition had been pronounced; and, the defendants consenting, it was ordered that the next friend of the plaintiff should be at liberty to amend the bill, by altering the name of the plaintiff, and by making the petitioner a defendant thereto, and otherwise as she might be advised, and be at liberty to file a supplemental bill; and such amendments, and the filing of such supplemental bill, were to be without prejudice to the further hearing of the petition, and to the contempt or contempts of the petitioner, in the petition mentioned; and that, in all other respects, the petition should stand over till that day week.

On the 19th of March, 1845, it was ordered, that the last-mentioned petition, so far as not already disposed of, should stand adjourned to the 4th of November then next; and that the detainer, which, under or in respect of the order made in the original cause, *Wortham v. Pemberton*, dated 22nd December, 1843, for the petitioner's commitment to the Queen's Prison, had been lodged against him, be withdrawn; and that the petitioner should not be taken into the custody of the tipstaff, or other officer of the court, under that order, without the special leave of the Court; and the withdrawing of the detainer was not, nor was the now stating order, to be considered as a discharge of the defendant's contempt, or to prejudice the same or any question; and the rights, remedies, and liabilities in this cause of the petitioner, and all other parties, were to be the same as if the detainer had not been lodged; and, notwithstanding the contempt of the petitioner, William Burton Newenham, he was to be at liberty to appear to the plaintiff's bill in this cause, and put in his plea, answer, or demurrer thereto, and to defend

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the same, as he should be advised, but without prejudice to his contempt; and all parties were to be at liberty to apply to the Court.

On the 17th of July, 1845, Newenham presented a petition by way of appeal to the Lord Chancellor, who, on the 14th of January, 1846, dismissed the appeal, with costs.

In pursuance of the order of the 8th of March, 1845, the bill was amended on the 18th of March, 1845, by altering the name of the plaintiff to Newenham, and by making William Burton Newenham a defendant thereto, as well as by setting out the above-mentioned indenture of the 18th of November, 1829, and also stating in detail the circumstances of the abduction.

On the 11th of July, 1845, the plaintiff presented a petition, praying that the report of the 20th of February, 1845, might be confirmed; and that the sum of 175*l.* per annum, or other the net annual income arising from the rents and profits of the real estates, might be allowed to the plaintiff's mother and next friend, for the maintenance and support of the petitioner during her minority; and that the petitioner might be at liberty to present a petition to Parliament for a dissolution of the marriage or supposed marriage, without prejudice in this Court to such proceedings and measures, for the protection of the petitioner's person, fortune, and estate, as the Court should think fit to direct, as against the defendant Newenham; and that, in the meantime, all needful directions might be given for the better protection of the petitioner's person, fortune, and estate; and that, whether the Court should or should not be pleased to authorise the institution of such proceedings before Parliament, the petitioner's fortune and estate might, by all proper deeds and instruments, or otherwise, be settled, assured, and secured for the benefit of the petitioner and her child, in such manner as to exclude and bar all claims and demands whatsoever of Newenham in respect thereof, under colour or by virtue of the marriage or supposed marriage; and that Newenham might not be

discharged from his contempt, until he should (if necessary) have executed or joined, or concurred in executing, such deeds and instruments; and that he might be ordered to pay the costs of, and incident to, that petition.

The defendant Newenham was served with the petition, but did not appear; and, by an order of July 19th, 1845, the report of the 20th of February, 1845, was confirmed, so far as the same related to the maintenance of the petitioner; and it was ordered, that if the petitioner, the infant plaintiff, or Jane Wortham, should present any petition to either Houses of Parliament, or prosecute any proceedings touching the marriage, or alleged marriage, the petitioner, or Jane Wortham, was to be at liberty to apply to the Court touching the costs and expenses of such petition and proceedings, and of all matters relating thereto; and the Court reserved the question, whether such costs and expenses should be allowed or provided for in this suit; and the order was to be without prejudice to the contempt of Newenham, or to any question relating thereto; and it was ordered that the rest of the petition do stand over until the hearing of the cause, or until the further order of the Court.

On the 7th of March, 1846, the defendant Newenham put in his answer, stating, among other things, that he had been informed, and believed, that such indentures of lease and of appointment and release, as were in the bill mentioned to bear date respectively the 14th and 15th days of August, 1828, were made of such date, and between such parties, and of or to such purport or effect, as in the bill in that behalf mentioned, but, for greater certainty, he craved leave to refer thereto when produced; that he believed that Maria E. Hawkins was still living, and that she was in the pernancy and enjoyment of the rent-charge in the bill mentioned; and that Francis Wortham died at or about the time in the bill in that behalf mentioned, and in the lifetime of Henry Hawkins, and leaving com-

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plainant, his daughter and only child, and Jane Wortham, his widow, him surviving; and that, upon the death of Henry Hawkins, the complainant became and was then entitled to the freehold and copyhold estates situate at Connington, in the bill mentioned, subject to a rent-charge of 200*l.* a-year, for an estate in tail general in possession.

1846.
Dec. 2nd.

The cause now came on to be heard, together with the petition of the plaintiff, of July 11, 1845, and the petition of the defendant, Newenham, of the 22nd of February, 1845.

Mr. Swanston and Mr. H. Prendergast for the plaintiff

Mr. Russell and Mr. Malins for the defendant Newenham

Mr. Cole for the trustees.

The VICE-CHANCELLOR referred it to the Master to make inquiries, substantially the same as those directed by the order of March 29, 1844, before Newenham was a party to the suit.

On the 14th of July, 1847, the Master made his report, finding to the same effect as he had found before, so far as is material to the present purpose.

The cause now came on to be heard, on further directions, with the two petitions.

1847.
Nov. 17th.

Mr. Swanston and Mr. H. Prendergast for the plaintiff
 —The circumstances of the case are such as to make it proper to settle on the plaintiff the whole of her property. There can be no doubt as to the jurisdiction of the Court to make such a settlement, now that the doctrine, which entitles a wife to a settlement out of her property, has been determined to extend to her equitable interests in

real estates,—a doctrine fully established by *Sturgis v. Champneys*(a); *Hanson v. Keating*(b). Indeed, the Court would have jurisdiction independently of this consideration, the husband being in contempt, and therefore being under the necessity of submitting to such terms as the Court may think fit to impose upon him. Nor can there be any difficulty arising from the bill not praying for a settlement in express terms, because the prayer is, that such proceedings may be taken, with reference to the abduction, as the Court shall think fit, and an infant is not under the necessity of praying for relief so specifically as an adult: *Stapilton v. Stapilton* (c). Moreover, the plaintiff's petition, which is now before the Court, does, in fact, expressly pray for the settlement to which she is entitled.

Mr. *Russell* and Mr. *Malins*, for the defendant Newenham.—There is no equitable estate in the case. The plaintiff is tenant in tail in possession of freehold estates, and her estate is purely legal. The trustees, who are made defendants, are merely formal parties: they are only trustees to preserve contingent remainders. Their estate is not affected by any trust for the benefit of the plaintiff, nor does the bill shew any equitable interest in her. The circumstance of a preceding tenant for life having exercised the power of jointuring, by limiting a term of two hundred years to trustees, does not alter the quality of the plaintiff's estate; it merely affords a remedy to the jointress if her rent-charge should not be paid. It is said, that the Vice-Chancellor *Wigram*, in *Hanson v. Keating*, extended the doctrine of *Sturgis v. Champneys* to an equitable interest in a term of years; but it is a fallacy to say that the plaintiff is the celle que trust of a term. She has no equitable chattel interest any more than she

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(a) 5 My. & Cr. 97.

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(b) 4 Hare, 1.

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(c) 1 Atk. 6.

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has an equitable freehold interest. It would be impossible to say that the plaintiff has any term of years in equity, or that she has any other equitable estate which can be made the subject of a settlement. [The *Vice-Chancellor*—It is said that the jointure term interposes such a legal estate as enables the Court to deal with the property while it is subject to the term.] But the term cannot be considered as a legal estate till it is called into action for the purpose of raising the jointure if it fall into arrears. In the meantime it is simply attendant upon the inheritance; and if an attendant term is sufficient to render the inheritance an equitable interest, there is hardly such a thing as a legal estate in the kingdom. In *Doe v. Thomas(a)*, the very point arose. The lessee, to whom the land was demised under a power of leasing, brought ejectment, and it was objected, that certain trustees of a jointure term of five hundred years had the first legal estate in point of limitation. What did Lord *Tenterden* say? Why, thus:—"If we were to hold that the term which was vested in the trustees was to be the first legal estate in the premises, uncontrolled by any other matter, the leasing power would be null and void, because the person in whom the term is vested might then at any time turn out the lessees. In order to avoid that inconvenience, we must consider the leasing power as controlling and superseding the term, and hold that the term ought not to have effect until the period when the trustees call that term into action. When they have called that term into action the leasing power will be put an end to, but until that is done, the term must be considered as subservient to the leasing power." [The *Vice-Chancellor*.—In that case, the leasing power took precedence.] It does not appear, however, that there was any clause marshalling the powers. [The *Vice-Chancellor*.—But the

(a) 9 B. & C. 294.

law will marshal them without any such clause, and leasing powers generally, or always, have precedence.] In *Doe v. Finch* (a) it was held, that a term did not prevent a fine levied by the party entitled as tenant in tail subject to the term, from working a discontinuance, the estate tail being considered an estate in possession, notwithstanding the term. [The *Vice-Chancellor*.—But, for the purpose of acquiring possession, the plaintiff in this case has no right, except one to be enforced by a Court of equity.] There is, however, nothing to disturb her possession, or to require the interposition of the Court. The jointure is regularly paid, and the term has never been called into action. The right of the tenant in tail to receive the rents is not under the term, or as *celle que trust*, but is founded wholly on her legal estate. It would cause surprise to trustees of a jointure term, if they were told they must receive the rents to hand them over to the freeholder: they would properly say they had nothing to do with the rents, until default was made in payment of the jointure [The *Vice-Chancellor*.—If an ejectment were brought on the demise of Mr. Newenham, would not the production of the deed creating the term defeat it?] We submit that it would not; and if it would, still the Court would interfere, for it would regard the term as merely attendant, and not as an interest out of which any settlement could be made upon the plaintiff. It is, however, immaterial to consider how the Court would act, if it were necessary for Mr. Newenham to be a plaintiff, and to seek its assistance. The circumstance of his asking no such assistance completely distinguishes this case from *Sturgis v. Champneys* and *Hanson v. Keating*; for even if the Court might compel him to make a settlement under such circumstances as the present, as the condition of its interference on his behalf, it has no jurisdiction to

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(a) 4 B. & Ad. 283.

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to interfere with his legal right, while he rests upon that, and seeks no equitable relief.

As to the question of contempt, it is, in the first place, not clear that the defendant has committed any, in not appearing, when no order of the Court to appear had been served upon him, and when the suit was constituted altogether irregularly, and the plaintiff was misdescribed in the bill. No process of contempt is in force against him; nor could the circumstance of a party being in contempt, as to the process of the Court, enable the Court to make an order a decree for the settlement of the property of such a party.

Mr. *Swanston*, in reply, was stopped by the Court.

The VICE-CHANCELLOR:—

There is so much of moral justice, and so much fairness and convenience in the *Lord Chancellor's* decision in *Sturgis v. Champneys*, that it would, I suppose, be a matter of general regret if it were held by the House of Lords not to be according to law.

However that may be, I find the decision before me, and I shall very willingly follow it.

Now it is true, that, in that case, the person who claimed against the wife's equity was seeking the assistance of the Court—a circumstance that does not exist here. But I do not collect that the *Lord Chancellor* decided the case upon that ground, or considered that, if the wife had filed the bill, she could not have had the same equity. The *Lord Chancellor* says, (a) “It was argued, that, it having been held in *Lady Elibank v. Montolieu* (5 Ves. 737), that the wife may come into this Court to assert her title to a settlement, the claim could no longer be put upon the ground

(a) 5 My. & Cr. 102.

of compelling the husband or his assignee seeking equity to do equity. In this case the assignee is plaintiff, and it is not therefore necessary to go beyond the facts now before me. If that case be applicable to the present, it would only prove that Lady Champneys might herself have come into this Court as plaintiff, to claim that which she now asks to have imposed as a condition of the decree sought by her husband's assignee. The existence of this higher equity would not deprive her of what she so asks." My opinion is, that, if it would be right to afford this relief to the wife when she is a defendant, as against a plaintiff seeking the interposition of the Court, and resisting her equity, it is right upon the authorities, (to one of the principal of which the *Lord Chancellor* referred in the passage just read,) to afford her relief upon a record constituted as the present is.

Is, therefore, this an equitable interest within the principle of the authorities? Upon that point I am unable to doubt. I do not say an equitable chattel interest, but an equitable interest; for, although she and her husband, or he in her right, may have the immediate legal freehold, there is a legal title which prevents the enjoyment except by means of a Court of equity, and renders the title to the rents equitable so long as the term lasts; and it appears to me, that the plaintiff is entitled to a settlement out of the rents during the joint lives of herself and her husband, or until the determination of the term; the remaining question being, whether, if the term shall by the clause for cesser determine, during the joint lives, the settlement can endure beyond that period.

His Honor heard the plaintiff's counsel in reply on this question, and held that the settlement could not be made beyond the jointure term. A reference was directed to the Master to approve of a settlement accordingly.

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A donee of a power affecting two sums of Stock of different descriptions, appointed a gross amount, part of one of them, and exceeding one-fourth part of it. Afterwards, she executed successively, deeds purporting to appoint aliquot parts of both funds, as one subject, and without noticing the previous appointment of the gross sum, which was never severed from the mass. The appointees comprised all the parties entitled, subject to the appointment, and the aliquot parts so appointed amounted to

BY an indenture of July 7, 1789, being the marriage settlement of Thomas and Ann Trollope, certain funds were settled upon trust for the husband and wife and the survivor, for their lives and the life of the survivor, with remainder in trust for all or any of the children of the marriage, in such parts, and subject to such limitations over, being for the benefit of some or one of such children as the husband and wife, or the survivor, should appoint, and in default of appointment, and subject thereto, upon trust for all the children equally, with survivorship clauses.

Mrs. Trollope survived her husband, who died leaving four children of the marriage—viz., Frances Trollope, Anna Barne Broome, George Trollope, and John Trollope.

By an indenture of appointment, dated 1st of October, 1819, made between Ann Trollope, then a widow, of the first part, the Rev. Arthur Eugenius Broome and Anna Barne Broome, his wife, of the second part, and Robert Routledge and Henry Sweeting, (the then trustees of the settlement,) of the third part; after reciting the settlement of 7th of July, 1789, and that there was then standing in the names of the said Robert Routledge and Henry

four-fifths, thus exceeding, with the earliest appointment, the entirety of one of the funds.

Held, 1. That the latest appointees were not entitled to put the earlier to their election, so that the excess might be made good out of the unappointed one-fifth of the unexhausted fund.

2. That the successive appointments of the aliquot parts operated upon aliquot parts of the whole of each fund, and that, therefore, the loss arising from the deficiency of the one fund fell upon the last appointees.

A tenant for life of a trust fund, with power to appoint the reversion to a child, appointed a portion of the reversionary fund to a daughter absolutely, by a deed to which the daughter, the daughter's husband, and the trustees of the fund were parties; and by the same deed she assigned her life interest in the appointed portion, to the daughter absolutely. By a subsequent witnessing part, it was expressed to be agreed and declared by and between all the parties, that the appointed portion should be held on trust for the daughter's separate use, during her life, and afterwards on trusts for her husband and children:—*Held*, that, (independently of any question as to the merger of the life estate), the trust for the separate use was good. But *quære*, whether the limitations of the subsequent interests were effectual.

The rule that the costs arising from difficulties of construction fall on the residuary estate, does not apply to an unappointed portion of a fund.

Sweeting, as the surviving trustees of the settlement, the sum of 3641*l.* 3*s.* 4*d.*, 4*l.* per cent. Consolidated Bank Annuities; and that Ann Trollope, being desirous of making some provision for her daughter, Anna Barne Broome, had, at the request of Arthur Eugenius Broome and Anna Barne Broome, determined and agreed, in exercise and execution of the power and authority to her given by the settlement, to give and appoint the sum of 1184*l.* 3*s.* 4*d.*, 4*l.* per cent. Consolidated Bank Annuities, part of the said sum of 3641*l.* 3*s.* 4*d.*, like Annuities, unto or for the benefit of Anna Barne Broome, and also in her favour to relinquish and give up the life interest of her, the said Ann Trollope, of and in the said sum of 1184*l.* 3*s.* 4*d.*, 4*l.* per cent. Consolidated Bank Annuities, so to be appointed, and the dividends and interests thereof, in manner thereafter mentioned; and that it had been agreed between the said parties thereto, that the said sum of 1184*l.* 3*s.* 4*d.*, 4*l.* per cent. Consolidated Bank Annuities, so to be appointed as aforesaid, should be settled upon such trusts and in such manner as was thereafter mentioned: It was witnessed, that, in pursuance and part performance of the said determination and agreement, and in consideration of the natural love and affection which the said Ann Trollope had for her daughter, the said Anna Barne Broome, and by virtue and in exercise and execution of the power and authority to her given or reserved in and by the said indenture of settlement, and by virtue and in exercise and execution of every other power, right, or authority whatsoever in her vested, or in anywise enabling her in that behalf, the said Ann Trollope irrevocably gave, limited, and appointed the sum of 1184*l.* 3*s.* 4*d.*, part of the said sum of 3641*l.* 3*s.* 4*d.*, 4*l.* per cent. Consolidated Bank Annuities, unto and for the benefit of the said Anna Barne Broome, to and for her own absolute use and benefit, and to be a vested interest in her immediately after the execution of that indenture. And it was further witnessed, that, in further pursuance and

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performance of the said determination and agreement, Ann Trollope gave, assigned, released, and quit-claimed unto the said Anna Barne Broome, her executors, administrators, and assigns, all the dividends, interest, and annual produce whatsoever, thenceforth during the life of the said Ann Trollope to arise or become payable for or in respect of the said sum of 1184*l.* 3*s.* 4*d.*, 4*l.* per cent. Consolidated Bank Annuities, to hold the same unto the said Anna Barne Broome, her executors, administrators, and assigns, to and for her and their own absolute use and benefit. And it was by the said indenture further witnessed, that, in pursuance of the said recited agreement in that behalf, it was thereby agreed and declared by and between all the said parties, and particularly the said Ann Trollope and the said Edward Eugenius Broome and Anna Barne Broome, his wife, did thereby respectively consent and direct, that, from and immediately after the execution of the said indenture, the said Robert Routledge and Henry Sweeting, and the survivor of them, his executors, administrators, and assigns, should stand possessed of the said sum of 1184*l.* 3*s.* 4*d.*, 4*l.* per cent. Consolidated Bank Annuities, thereby appointed to or in favour of the said Anna Barne Broome as aforesaid, upon the trusts therein-after declared: that was to say, upon trust for the separate use of the said Anna Barne Broome for life; and after her decease, upon trust for the said Arthur Eugenius Broome for life; and after the decease of the survivor of them the said Arthur Eugenius Broome and Anna Barne Broome, upon trust for the children of the said Arthur Eugenius Broome and Anna Barne Broome, in such shares as the said Anna Barne Broome, whether covert or sole, should appoint; in default of appointment, amongst the children equally; and if there should be no child of the said Arthur Eugenius Broome and Anna Barne Broome, who should live to attain a vested interest in the said fund, under the trusts of the said indenture, then upon trust for such person or persons as the said Anna Barne

Broome, whether covert or sole, should by deed or will limit, direct, or appoint.

By an indenture, dated the 14th of August, 1824, made between Ann Trollope, of the one part, and Frances Trollope, of the other part, reciting the settlement of the 7th of July, 1789, and reciting that the trust funds subject thereto then consisted of the sum of 3641*l.* 3*s.* 4*d.*, 4*l.* per cent. Consolidated Bank Annuities, and 2033*l.* 8*s.* New 4*l.* per cent. Annuities, Ann Trollope appointed unto Frances Trollope one equal fifth part or share of and in the said sums of Old 4*l.* per cent. Bank Annuities, and New 4*l.* per cent. Bank Annuities.

By an indenture of August 28, 1824, and made between Ann Trollope, of the one part, and John Trollope, of the other part, after reciting to the same effect as in the last-mentioned indenture, Mrs. Ann Trollope appointed another equal fifth part of the same two funds to her son, John Trollope; and afterwards, by an indenture of September 17, 1825, she appointed one-tenth of the sums of 2033*l.* 8*s.*, New 4*l.* per cent. Bank Annuities, and 3781*l.* 18*s.* 2*d.*, 3*l.* per cent. Consolidated Bank Annuities (into which the said sum of 3641*l.* 3*s.* 4*d.*, 4*l.* per cent. Consolidated Bank Annuities had been converted), to her son, John Trollope, in addition to the one-fifth share already appointed to him.

By an indenture of 21st January, 1826, she appointed one-fifth part of the same sums of stock to her son, George Trollope; and by the same indenture she appointed one-tenth part of the same sums for the benefit of her daughter, Frances Trollope, in addition to the one-fifth already appointed in her favour.

Mr. Broome had died, and the life-interest of Mrs. Broome in the sum of 1184*l.* 3*s.* 4*d.*, 4*l.* per cent. Consolidated Bank Annuities, appointed by the indenture of the 1st of October, 1819, as well as her contingent interest in the capital of that fund, had by different mesne assignments become vested in a Mr. Spong, and the other shares had also been assigned and incumbered.

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The present suit was instituted by Frances Trollope, to have the trusts of the settlement carried into effect; and at the hearing various inquiries had been directed. The cause now came on to be heard on further directions, upon the Master's report finding (among other things) to the effect above stated.

The first question raised was as to the effect of the appointments of the three one-fifth and two one-tenth shares of the two sums of 3641*l.* 3*s.* 4*d.*, 4*l.* per cent. Consolidated Bank Annuities, and 2033*l.* 8*s.*, New 4*l.* per cent. Annuities, by the deeds, August 14, 1824, August 28, 1824, September 17, 1826, and January 21, 1826, these appointments being excessive as regarded the former fund, after deducting therefrom the portion appointed by the deed of October 1, 1819, but being insufficient, as regarded the latter fund, to exhaust the whole of it. Under these circumstances it was contended, on behalf of those interested under the appointments of 1824, 1825, and 1826, that the deficiency in the one fund ought to be made good out of the surplus of the other, the appointments being made of both funds, and that Mrs. Broome, or those claiming under her, and the other parties claiming under the earlier appointments, could not take the appointed shares without giving effect to the latter appointments, by giving up their shares in the unappointed part of the 2033*l.* 8*s.*, New 4*l.* per cent. Bank Annuities. It was also contended, in the alternative, on behalf of those claiming under the latest of these appointments, that all the appointments after that of 1819 must be taken to operate upon the residue only, after deducting the gross amount then taken out of one fund.

Mr. *Bacon* and Mr. *Renshaw* appeared for the plaintiffs.

Sir *F. Simpkinson*, Mr. *Swanston*, Mr. *Sidebottom*, and Mr. *Roxburgh*, for various defendants interested in these questions.

The VICE-CHANCELLOR said, that his impression was, that the donee of the power meant to give the proportions which she had appointed of each fund; and that, so far as the one fund was deficient, the latest appointees must suffer the loss.

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The next question was as to the effect of the deed of 1819, Mrs. Broome having joined in an assignment of the interest of herself and her husband under that deed, the validity of which, as against her, depended on that of the limitation to her separate use in the deed of 1819.

Mr. *Russell* and Mr. *Roundell Palmer*, for Mrs. Broome.—The deed of 1819 consists of two parts. By the one, the donee of the power made a valid appointment of a reversionary interest to Mrs. Broome absolutely. By the other, Mrs. Broome and her husband make what was intended to be a settlement of the appointed fund. As regarded Mrs. Broome, that settlement was altogether inoperative. If the fund had been reduced into possession during the coverture, the settlement would have operated as being that of the husband; but, as this did not happen, the settlement failed, and the fund still belongs to Mrs. Broome, under the appointment, she never having done any act to affect it, when competent so to act. The circumstance of the tenant for life surrendering her interest was not sufficient to reduce the reversionary interest into possession, so as to enable the husband and wife to dispose of it: *Story v. Tonge* (a). Nor is the case even brought within the authority of *Hall v. Hugonin* (b), or *Creed v. Perry* (c), even supposing that the decisions in those cases can be upheld, for in both of them the consent of the wife was taken in court. [The *Vice-Chancellor*.—I have great difficulty in understanding how a married woman can do any

(a) 7 Beav. 91. See *Whittle v. Henning*, 2 Phil. 731, which decides that point.

(b) 14 Sim. 595.
(c) Id. 592.

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act to prejudice her reversionary interest in mere personalty. Is not accepting a surrender such an act?] We submit it is clearly so. If the deed is void as regards her, the argument must be, that a deed to which she was no party could alter her reversionary interest. It has never been contended that a husband could accept a surrender for his wife. In the cases to which we have referred, before the *Vice-Chancellor of England*, that learned judge must have considered that the circumstance of the married woman appearing in court and consenting, made a difference. No such circumstance exists here. The deed cannot constitute a binding acceptance of the surrender, and without such acceptance there could be no reduction into possession. [The *Vice-Chancellor*.—Was the appointed fund taken out of the names of the original trustees, or in any way severed from the mass?] It never was. The intention of the deed was to make a settlement, but not to reduce the fund into possession; nor is there any dealing with the fund whatever on the part of the husband. [They also cited *Wall v. Tomlinson* (a).]

THE VICE-CHANCELLOR.—The language of the settlement creating the power is thus: "Upon trust for all or any of the children of the said Thomas Trollope, on the body of the said Ann Steel to be begotten, in such parts, shares, and proportions, manner and form, and with, under, and subject to such powers, provisos, declarations, and limitations over, being for the benefit of some or one of such children, as they the said Thomas Trollope and Ann Steel, his intended wife, by any deed or deeds, writing or writings, to be by them sealed and delivered, in the presence of and attested by two or more credible witnesses, should direct, limit, or appoint; and for want of such joint direction, limitation, or appointment, then, as the survivor of them, the said

(a) 16 Ves. 413.

Thomas Trollope and Ann Steel, by any deed or deeds, writing or writings, to be by such survivor sealed and delivered, in the presence of two or more credible witnesses, or by his or her last will and testament in writing, to be by such survivor signed and published in the presence of two or more such witnesses, should direct, limit, or appoint, give, or bequeath the same."

That power would enable the donee to appoint the subject-matter of the power to the separate use of the married woman, who is one of the objects.

Now, the first instrument by which the power is expressed to be exercised, contains these recitals: [His Honor read them, to the effect above stated.] Then comes an appointment to Mrs. Broome absolutely, not for her separate use. Then comes the assignment to Mrs. Broome of the life interest of her mother, but not to the separate use of Mrs. Broome. The deed then proceeds thus: "And this indenture further witnesseth, that, in pursuance of the said agreement, it is hereby agreed and declared, by and between all the said parties hereto, and particularly the said Ann Trollope and the said Arthur Eugenius Broome and Anna Barne Broome, his wife, do hereby respectively consent and direct, that, from and immediately after the execution of these presents, the said Robert Routledge and Henry Sweeting, and the survivor of them, his executors and administrators, shall stand possessed of the said sum of 1184*l.* 3*s.* 4*d.*, 4*l.* per cent. Consolidated Bank Annuities, hereby appointed to or in favour of the said Anna Barne Broome, as aforesaid, upon the trusts hereinafter declared, that is to say," [His Honor then read the limitations as stated above.]

In construing a deed, the mere form, in a case like this, is not material. The order and arrangement are also not material. The question is, what is the intention of the whole taken together? Mrs. Trollope had power to appoint to the separate use of the daughter, without the daughter's consent. It has never, I believe, been decided, that a re-

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straint upon alienation of income by a married woman is inconsistent with an absolute estate in the capital for her separate use. And, I suppose, that a limitation or an estate for life for a married woman's separate use, is consistent with her having an absolute estate in the capital not for her separate use. The intention here is plainly expressed by the donee of the power, that this lady should take the fund for her separate use during her life.

It is a question relating to the ulterior title, whether the gift to the children could be valid without Mrs. Broome's consent; and the consequence of her not consenting may be to deprive her children of the benefit of the ulterior appointment, and to leave the fund unappointed after her decease. If, however, the limitation to the separate use is good, the incumbrancer on Mrs. Broome's life interest must be entitled to the dividends accruing during her life on the fund appointed by the deed of 1816. Her counsel can address themselves to this point.

Mr. Russell and Mr. Roundell Palmer.—The intention of the donee must be taken to have been one single intention, and cannot be split into two, so as to be good as regards the limitation to the separate use only. It is clear that the donee of the power intended to give, and did in effect give, an absolute interest in possession to Mrs. Broome. Having done so, she had exhausted the power as regarded this portion of the fund. What follows was intended to operate, by way of settlement, on the interest so created by the appointment. As the husband did not survive the wife, the settlement is inoperative, but it could not have been intended to be made under the power, for the greater part of the trusts are beyond the scope of the power, and would be void if considered as an intended execution of it. [They cited *White v. St. Barbe* (a).]

Mr. Humphrey and Mr. Lovat, for Mr. Spong, the incum-

(a) 1 V. & B. 399.

brancer on Mrs. Broome's share, referred to *Bray v. Bree* (a); but were stopped by the Court.

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The VICE-CHANCELLOR :—

I think the shape less to be regarded than the substance—the means than the end. It appears that all the parties to the deed of 1819 had one single intention which was, to give the fund to the use of the wife for life, for her separate use, then to the husband for life, then to the children of the marriage, with remainders over. It is agreed on all hands, that this intention cannot be carried into effect completely. The question, therefore, is, whether it is to be carried into effect so far as it can be, or whether all is to fail. If all is to fail, Mrs. Broome loses every thing. That cannot be right. The other alternative would give effect to the limitation to Mrs. Broome for her separate use. It would not be proper to destroy the effect of the appointment wholly, because I cannot carry every part of it into execution. I think that the incumbrancer on Mrs. Broome's life estate has the better claim. I decide nothing, except so far as regards Mrs. Broome's life interest.

Mr. *Simpson*, for one of the incumbrancers, contended, that, as there was a fair question occasioned by the language of the deeds, the costs ought to come out of the unappointed part of the 2033*l.* 8*s.*, by analogy to the case of a will, where the costs arising from difficulties of construction fall upon the residuary estate.

The VICE-CHANCELLOR said, that, as he believed, the rule had not been applied to appointments, and directed the costs to be apportioned according to the amounts of the appointed and unappointed parts of the fund, and to be borne by those parts respectively, according to their amounts; but that the costs occasioned by the incumbrances should be borne by the shares affected by them respectively.

(a) 2 C. & F. 453.

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The funds had been transferred into the name of the Accountant-general, and consisted of 2033*l.* 8*s.*, 3*l.* 5*s.* per cent. Annuities, into which the above-mentioned sum of the same amount of New 4*l.* per Cent. Annuities had been converted, and of 4017*l.* 8*s.* 7*d.*, 3*l.* per cent. Consolidated Bank Annuities, which last sum was composed of the above-mentioned sum, 3781*l.* 18*s.* 2*d.* like Annuities, and 235*l.* 10*s.* 5*d.* like Annuities, which had arisen from interest upon it. The following are minutes of the material portions of the decree :—

Declare, that 406*l.* 13*s.* 9*d.*, 3*l.* 5*s.* per cent. Annuities, part of the 2033*l.* 8*s.*, like Annuities, are unappointed, and that, under the trusts of the settlement of the 7th of July, 1789, one-fourth of the sum (subject to the satisfaction of its proportion of the costs, hereinafter directed to be taxed) was payable to the defendant Anna Barne Broome, one other one-fourth part to the plaintiff Frances Trollope, and one other one-fourth part to the defendant William Trollope, as the personal representative of George Trollope, and the remaining one-fourth part was payable to the defendant William Trollope, as the personal representative of John Trollope.

Sell 235*l.* 10*s.* 5*d.* Consolidated Bank Annuities, part of the 4017*l.* 8*s.* 7*d.* like Annuities.

Tax, as between solicitor and client, the costs of all parties except Anna Barne Broome; and let the Taxing Master certify the total amount of the costs, and also the amount of one-third and two-thirds of such costs; and let the Taxing Master also tax, as between solicitor and client, the costs of the defendant Anna Barne Broome.

Let so much of the 2033*l.* 8*s.*, 3*l.* 5*s.* per cent.

Annuities as will be sufficient to raise one-third of such costs as aforesaid, be sold, and let so much of the residue of the said 4017*l.* 8*s.* 7*d.*, 3*l.* per cent. Consolidated Bank Annuities as shall be sufficient to raise two-thirds of such costs as aforesaid, together with the costs of the defendant Anna Barne Broome, be sold.

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Let so much of 1229*l.*, 3*l.* per cent. Bank Annuities, other part of the said 4017*l.* 8*s.* 7*d.* like Annuities, as shall remain after deducting one-third of the amount so to be sold as aforesaid, be carried over in trust in the cause, to an account to be intitled, "The account of the share claimed under the deed of the 1st day of October, 1819;" and let the interest to accrue on the said last-mentioned sum of stock be paid to the defendant Thomas Spong, during the life of Mrs. Broome, or until further order, with liberty for all parties to apply.

Let so much of 756*l.* 7*s.* 7*d.*, 3*l.* per cent. Bank Annuities, further part of the said 4017*l.* 8*s.* 7*d.* as shall remain after deducting one-third of the amount so to be sold as aforesaid, be transferred to the defendant Henry Lee; and let so much of 756*l.* 7*s.* 7*d.*, like Annuities, as shall remain after deducting a like one-fifth of the amount sold to raise two-third parts of the costs, be transferred to the defendants James Christian, Clement Bell, John Chapman, and William Thompson.

And let so much of 378*l.* 3*s.* 9*d.*, 3*l.* per cent. Bank Annuities, (further part of the said 4017*l.* 8*s.* 7*d.*.) as shall remain, (after deducting one-tenth of the amount to be sold as aforesaid,) be transferred to the defendant Henry

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Lee; and let two-third parts of the residue of the said 4017*l* 8*s* 7*d*, 3*l* per cent. Bank Annuities, after the above sales and carryings over, be transferred to the defendants, James Christian, Clement Bell, John Chapman, and John Wray; and let the residue of the said 4017*l* 8*s* 7*d*, 3*l* per cent. Bank Annuities, be transferred to the plaintiff Frances Trollope.

Let the amount of one-fifth part, and of one-tenth part of the residue of the said 2033*l* 8*s*, 3*l* 5*s* per cent. Annuities, which shall remain after the sale, as hereinbefore directed, be transferred to the defendant Henry Lee; and let other one-fifth part thereof be transferred to the defendants James Christian, Clement Bell, John Chapman, and William Thompson; other one-fifth part thereof to the defendants James Christian, Clement Bell, John Chapman, and John Wray; and other one-tenth part thereof to the plaintiff Frances Trollope; and let one-fourth part of the residue of the said 2033*l* 8*s*, 3*l* 5*s* per cent. Annuities, after such transfers and sales, be transferred to the defendant Anna Barne Broome; one-fourth part of such residue to the said plaintiff, Frances Trollope, spinster; and the residue of the said 2033*l* 8*s*, 3*l* 5*s* per cent. Annuities, to the said defendant, William Trollope.

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Dec. 2nd.

THIS was a suit instituted on behalf of the plaintiff, and all other the unsatisfied creditors by simple contract of Sir Gregory Page Turner, Bart., deceased, against his executors, his heir-at-law, and his widow, and others.

The plaintiff claimed to be a creditor of Sir Gregory Page Turner, for certain pictures and statues sold to the latter for considerable sums of money, which were secured by the promissory notes of Sir Gregory Page Turner, dated in the year 1823. On these promissory notes, the plaintiff, in 1823, brought actions against Sir Gregory Page Turner, and lodged detainers against him, he being then in prison for debt.

Subsequently, and in the month of December, 1823, a commission of lunacy was issued against Sir Gregory Page Turner, under which he was declared a lunatic as from the 1st of July, 1823.

On the 22nd of June, 1825, Sir Gregory Page Turner, by his committee, filed a bill against the plaintiff, praying to have the notes delivered up on the ground of alleged inadequacy of consideration, or that they might stand as a security for what was really due, and for an injunction to restrain the action.

The plaintiff put in his answer to that bill; and, by an order of the 27th of July, 1825, made in that cause, it was ordered, by consent of the present plaintiff, that the detainer in the action should be discharged, and the action discontinued, and the suit and all other proceedings stayed, and that the present plaintiff should go in and establish such claim as he might be able under the lunacy.

The plaintiff did not take any proceedings in the lunacy,

In 1825, the holder of a promissory note brought an action, against the maker, who became lunatic; whereupon the lunatic and his committee filed a bill to restrain proceedings in the action, on the ground of alleged insufficiency of consideration for the note; and, upon the motion for an injunction, an order was made by consent, staying proceedings in the action and the suit, with liberty for the holder of the note to go in and establish his claim in the lunacy. He accordingly took proceedings to support his claim before the Master in lunacy, who, however, disallowed it, and in August, 1830, made his report, without including in it the name of the holder of the note as a creditor. The lunatic died in March, 1843; and, in February, 1844, the holder of the note filed a creditors' bill against the representatives of the lunatic:—*Held*, that the plaintiff was not entitled to be relieved from the effect of the Statute of Limitations.

March, 1843; and, in February, 1844, the holder of the note filed a creditors' bill against the representatives of the lunatic:—*Held*, that the plaintiff was not entitled to be relieved from the effect of the Statute of Limitations.

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to establish his debt, until 1827. His first warrant for attending upon his claim was dated the 26th of February, 1827, on which day the claim was carried in before the Master in the matter of the lunacy.

The Master made his first report in the lunacy on the 9th of August, 1828. In the second schedule to this report the plaintiff's name was inserted, and his demand was entered as a claim. This report was confirmed in February, 1829, and the Court referred it back to the Master to consider the claim so reported to be open.

In July, 1829, the plaintiff again proceeded with his claim before the Master, who more than once enlarged the time, to enable him to adduce proofs in support thereof, until the 6th of August, 1829, when, no further evidence being adduced, the Master indorsed on the claim a memorandum that it was disallowed by him.

The Master subsequently, viz. on the 3rd of August, 1830, made his second and final report, allowing some of the claims contained in the second schedule to his first report, but omitting all reference to the plaintiff or his claim.

On the 9th of August, 1830, this report was confirmed.

The plaintiff did not except either to the Master's first or second report, nor took any further step in the lunacy in respect of his claim.

It appeared, however, that a negotiation took place between the plaintiff and the solicitors for the committees, recognising some amount as being due, and in which an offer to pay a considerable sum by way of compromise was made on behalf of the committees.

In 1841, Sir Gregory Page Turner, during a lucid interval, made his will, dated the 15th of March in that year, by which he directed payment of his debts, and charged the same on his real estates; but he remained generally of unsound mind, and the proceedings in lunacy against him remained in force till his death, which happened on the 6th of March, 1843.

The will was proved by some of the defendants, the executors named therein, without dispute or question, shortly after the death of Sir Gregory Page Turner.

The plaintiff took no further steps whatever to substantiate his claim, until the institution of this suit.

The bill was filed on the 5th of February, 1844, stating the above facts, and that there had been divers proceedings in the lunacy on the part of the plaintiff, to establish his claim, but that they were not finally wound up, and that plaintiff's claim had never been allowed, and that he had been unable to obtain payment.

The defendants demurred generally, for want of equity. The demurrer was argued on the 5th of November, 1844, and overruled, without prejudice to any question at the hearing of the cause. The costs were reserved (*a*).

The defendants subsequently answered, and claimed the benefit of the Statute of Limitations, among other defences which they set up.

The cause now coming on to be heard, the principal question was, whether the plaintiff was, under the circumstances of the case, precluded, by the operation of the Statute of Limitations or otherwise, from enforcing his demand.

Mr. *Russell* and Mr. *Glasse*, for the plaintiff.—The contention between the plaintiff and the committee of Sir Gregory Page Turner was never one of debt, but of amount only. It was the injunction which intercepted the proceedings in the action, and this Court ought not to prejudice by its act the rights of the plaintiff; and therefore his right to sue continues, notwithstanding such a lapse of time as otherwise might have entitled the defendants to rest their defence upon the Statute of Limitations.

We concede that the plaintiff might, as a creditor, have excepted to the Master's report, but he was not bound to

(*a*) See 1 Coll. 477.

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do so; and, moreover, it would have been imprudent for him to have incurred the expense, all the assets of the lunatic being required for his maintenance, and it being a rule, in lunacy, not to allow any money to be applied in payment of a lunatic's debts until after the maintenance of the lunatic has been provided for.

Mr. Wigram and Mr. Freeling, for the executors of Sir Gregory Page Turner.—The plaintiff's claim, if he ever had any against the lunatic, was, as he states it, a legal debt upon simple contract, and is barred by the Statute of Limitations.

The order of July, 1825, does not relieve the plaintiff from the effect of the statute. It may be true that a Court of equity will interfere to prevent its own order prejudicing the rights of a party against whom such order has been made adversely, as the Court has said in *Bond v. Hopkins* (a), and in *Pulteney v. Warren* (b); but the ground of that equity is laid down by Lord Cottenham in *Brown v. Newall* (c), and it does not apply to this case, because the order of July, 1825, was made by consent. If we had proceeded with the suit, the present plaintiff might have been subjected to the costs of it.

Nor would the plaintiff's remedy have been lost by the death of the lunatic, for he might have preferred his claim in the lunacy on the day after the consent order; and if his claim had been taken in during the life of the lunatic, the Court would have had jurisdiction after his death to allow it, and direct payment: *Ex parte M'Dougal* (d).

Having elected his tribunal, the present plaintiff proceeded before it, and failed; and he can have no equity now to call on this Court to interpose, and prevent the ordinary effect of the Statute of Limitations.

(a) 1 Sch. & Lefr. 413.
(b) 6 Ves. 73.

(c) 2 My. & Cr. 572.
(d) 12 Ves. 384.

Mr. Teed, Mr. Willcock, and Mr. Webb, for the other defendants.

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Mr. Russell, in reply.—Consent does not vary the effect of the injunction. By the order of 1825 we were arrested in our legal remedy, and our claim before the Master was undisposed of at the date of the lunatic's death, in 1843. Jurisdiction then ceased: *In re Barry* (a). The operation of the statute De Prerogativa Regis (b) is confined to the life of lunatics. The case of *Ex parte M'Dougal* came on, not in lunacy only, but in the lunacy, and in a cause of *Erskine and Others*, creditors of the lunatic, after his death, against the personal representatives of the lunatic.

Bampton v. Birchall (c) and *Davenport v. Stafford* (d) were also cited.

THE VICE-CHANCELLOR :

The plaintiff's demand in this case is clearly legal, and not equitable. His title to sue in this court arises from the circumstance of the death of the debtor, or alleged debtor, enabling him to come to a Court of equity for the administration of the assets of the deceased. Still his is a legal demand only, which was the subject of an action, commenced so far back as 1825, against the alleged debtor, then a lunatic.

The lunatic and his committees filed a bill to be relieved against that action, and the defendant put in his answer; and in July, 1825, an order was made in the cause, expressly upon the consent of all parties, that the action should be discontinued, and the suit and all other proceedings stopped, and that the plaintiff, the then defendant, should go in and establish such claim as he might be able to do under the lunacy.

(a) 1 Molloy, 414.

(b) 17 Ed. 2, stat. 1, c. 10.

(c) 5 Beav. 67.

(d) 8 Id. 505; see p. 522.

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Independently of the circumstances under which this order was made, whether by consent or otherwise, I have no jurisdiction to discharge or vary it; and, if I could do so, no case has been made before me for such relief.

In every sense, and for every purpose, this order binds me in this Court.

The language of the order is very remarkable, for the injunction is directed not until the hearing or further order, nor against the action then pending only. The injunction is general and absolute. It is an absolute bar to all legal demands against the lunatic—and a legal demand alone this was. The suit was stayed by the order; thus the one party was prevented from proceeding in a court of law, and the other from proceeding in a court of equity; and the plaintiff was to be at liberty to carry in his claim before the Master in the lunacy.

He carried in his claim in the lunacy accordingly. Independently of the order, the present plaintiff was not bound to go before the Master in the lunacy.

I do not say that a state of things might not have arisen, in which, notwithstanding this order, the plaintiff in this cause might have sued at law or in equity for his demand, either in the lifetime of the alleged debtor, or after his decease. But has such a state of things arisen here? This creditor actively availed himself of the liberty given to him by the order: he carried in his demand before the Master, and, more than three years afterwards, the Master, in his report, mentioned his claim as one for further inquiry. That report was confirmed in the lunacy in February, 1829. It was referred back to the Master to consider the claim which he had reported as open. The present plaintiff endeavoured to sustain his demand; but the claim failed, according to the judgment of the Master, who indorsed upon it the memorandum of the 6th of August, 1829.

The commission was never superseded, and nothing further was done by the plaintiff until after 1843, when the lunatic died; the creditor being absolutely quiescent for the whole interval, from the 5th of August, 1829, until the 6th of March, 1843.

Now, the Statute of Limitations clearly disposes of this plaintiff's claim, unless the proceedings in the lunacy exclude the effect of that statute. The question is, whether it is reasonable or right, under these circumstances, to interpose to prevent its operation. I am of opinion, that it is not.

Dismiss the bill with costs, except as to the demurrer; and let the plaintiff's costs of the demurrer be allowed him, and deducted.

1847.
Rock
v.
Cook.

GATHERCOLE v. WILKINSON.

Nov. 25th and
Dec. 1st.

MR. HISLOP CLARKE, for the plaintiff, moved for leave to enter an appearance for a defendant named William Whitehead Chandler. The only evidence of the service of the subpoena upon him was that of the plaintiff's solicitor, showing that he had been unable to serve the defendant personally, and stating that he had left a copy of the subpoena at the residence of the defendant's father, with a letter to the defendant, asking him to inform the deponent of his place of residence, or to cause appearance to be entered for him; to which letter the defendant had sent the following answer in his own handwriting:—

“Saturday, 7th August, 1847.—Mr. William Whitehead Chandler presents his compliments to Messrs. Dean, Leeks,

Held, that a letter from a defendant, admitting the receipt of a copy of a subpoena, was not sufficient evidence that he had been served, for the purpose of entitling the plaintiff to enter an appearance for him, although all attempts to serve him personally had failed, and there was reason to believe he kept out of the way to avoid service.

1847.
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v.
WILKINSON.

Dixon, & Redpath, and begs to inform them that he has received their letter, inclosing the subpœna to appear to bill filed by the Messrs. Gathercole against him, and he begs to acknowledge the receipt thereof, and to state that he will attend to it."

A former motion for substituted service, on the ground of the defendant's keeping out of the way to avoid service of the subpœna had been made, supported by an affidavit to that effect, but had been refused. It was now contended, that, under the circumstances, the defendant had been served as effectually as was practicable, and that he could not at any future time object to the sufficiency of the service.

THE VICE-CHANCELLOR thought, that, for all substantial purposes, the defendant had been served; but he feared, that, technically, the service was not sufficient^(a). If the officers of the Court made no difficulty, his Honor was willing to make the order.

It was afterwards stated that the Registrars considered the service insufficient; and the motion was refused.

(a) See 4th Order of December 21, 1833, and 29th Order of May 8, 1845.

1847.

SIBBERING v. EARL OF BALCARRAS.

Dec. 1st.

MR. J. V. PRIOR, on behalf of the defendant, moved that the plaintiff might be ordered to give security for costs, on the ground of his having insufficiently described himself in the bill. The description was, "formerly of Blackrod, in the county of Lancaster, but now working on the line of railway between Sheffield and Manchester, labourer." In support of the motion, *Calvert v. Day* (a), and *Player v. Anderson* (b), were cited.

Quære, whether a plaintiff, who in his bill describes himself insufficiently, though not erroneously, will be ordered to give security for costs.

Where the plaintiff only described himself as "working on the line of railway between Sheffield and Manchester:"—*Held*, that the description was insufficient; and a motion that he might give security for costs was ordered to stand over, to give him an opportunity of amending.

Mr. Hargrave for the plaintiff.—The description is sufficient. In *Fraser v. Palmer* (c) Baron *Alderson* said, it could not be contended that a person was to give security for costs, on the mere ground that he was in the habit of moving from place to place; and in the course of the argument his Lordship said: "You only shew a difficulty in finding him: you do not say he is out of the jurisdiction." A description of a party as of a particular parish would be sufficient, and the description here is as definite as that. At all events, the insufficiency is no ground for the present motion, the description being, so far as it goes, correct; whereas, in all the cases cited, the description was complete, but was erroneous.

Mr. J. V. Prior in reply.

The VICE-CHANCELLOR:—

The description appears to me insufficient; but I am not so clear that the proper consequence of the insufficiency is a motion of this description. I take it, a demurrer

(a) 2 Y. & C. 217.

(b) 15 Sim. 104.

(c) 3 Y. & C. 280; and see *Simpson v. Burton*, 1 Beav. 557.

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would lie to the bill (a). The best course will be, to let the motion stand over, to afford the plaintiff an opportunity of giving a better description of himself by amendment.

(a) See *Rowley v. Eccles*, 1 S. & S. 511; 1 Dan. Ch. Pr. 463; and see next case.



Dec. 8th.

SMITH v. CORNFoot.

A plaintiff who inadvertently described herself as of a place which she had left at the date of the filing of the bill, was not ordered to give security for costs. And a motion for that purpose was refused; but the Court gave the defendant making it his costs, on his not putting the plaintiff to amend her bill.

THE bill was filed on the 21st of May, 1847, in which the plaintiff was described as Maria Smith, of No. 89, Windsor-terrace, Dover-road, Surrey, spinster. It appeared that this was the plaintiff's residence on the 21st of April, 1847, at the time the instructions for the bill were given to her solicitor. On the 24th of that month she removed to No. 74, York-road, and from thence, shortly afterwards, she removed to No. 1, Lambeth-road, Lambeth; and that the plaintiff, being ignorant of the rules of the Court, and for no other reason, did not communicate her change of residence to her solicitor.

Mr. *Russell*, Mr. *Bacon*, and Mr. *Grove*, now moved that the plaintiff should give security for costs, and for a stay of proceedings in the meantime. They cited *Sandys v. Long* (a) as having settled the practice, that a plaintiff, not stating his residence correctly, must give security for costs.

They admitted that the defendant knew the plaintiff's present address.

Mr. *Wigram* and Mr. *Mackeson* for the plaintiff.—The

(a) 2 My. & K. 487.

Court will not order a plaintiff, residing within the jurisdiction, to give security for costs in case of an inaccurate address, unless the misstatement appears to be for the purpose of wilful deception. *Simpson v. Burton* (a) and *Kerr v. Gillespie* (b) were decided on this principle. Wilful deception is not in this case attributed to the plaintiff.

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SMITH
v.
CORNFOOT.

The VICE-CHANCELLOR :—

The defendant, admitting at the bar that he now knows the plaintiff's address, and not putting her to amend her bill, the plaintiff must pay the costs of this motion; but she is not to give security for costs.

(a) 1 Beav. 556.

(b) 7 Id. 269.

BULL v. FAULKNER.

Dec. 3rd.

THIS was a suit instituted by a judgment-creditor, to have the real estate of the debtor sold, under the provisions of the 1 & 2 Vict. c. 110, s. 13, which provides that a judgment-creditor shall have the same remedies in a court of equity against the hereditaments of the debtor, as he would have had if the debtor had, by writing under his hand, agreed to charge the same with the judgment debt. The plaintiff had been in possession of the lands, under a writ of elegit sued out under the 11th section of the same act. The principal question discussed was, whether, in taking the accounts, the plaintiff ought to be charged with such sums as he might have received "but for his wilful default."

In a suit by a judgment-creditor, who had been in possession under an elegit, to have the real estates of the debtor sold, under 1 & 2 Vict. c. 110, the plaintiff must account in the same manner as a mortgagee in possession.

1847.
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 v.
 FAULKNER.

Mr. *Bacon* and Mr. *C. M. Roupell*, for the plaintiff—
 An *elegit* creditor is not in the same situation as a mortgagee. The new act applies to the whole of the lands the same law as existed previously with respect to half of the lands, and that law arises under the Statute of Westminster the 2nd, 13 Edward 1, c. 18, which provides, that, when a debt is recovered or acknowledged, or damages adjudged in the King's Court, the plaintiff shall have his election either to have the writ of *fiery facias*, or else that the sheriff shall deliver to him all the chattels of the debtor, saving only his oxen and beasts of the plough, and also one-half of his lands, until the debt is levied upon a recoverable price or extent. Now, it has been never held, that, under that act, the *elegit* creditor was liable to account for more than he received. The contrary may be inferred to be the rule, from what was said by Lord *Hardwicke*, in *Godfrey v. Watson* (a). That case came on upon exceptions to the Master's report, one exception being, that he had not allowed interest beyond the penalty of the judgment. Lord *Hardwicke* there said—"At law, upon a judgment entered up, it is the *debitum recuperatum*, and the stated damages between the parties; but if the creditor does not take out a *fiery facias* against the person of the debtor, or his personal estate, but extends the lands by *elegit*, which the sheriff does only at the annual value, and much below the real, the creditor holds *quousque debitum satisfactum fuerit*; and at law the debtor cannot, upon a writ *ad computandum*, insist upon the creditor's doing more than account for the extended value; but if the debtor comes into a court of equity for relief, this Court will give it him, by obliging the creditor to account for the whole that he has received." But Lord *Hardwicke* did not go on to say that the *elegit* creditor should account for what he might have received

(a) 3 Atk. 517; Reg. Lib. 1746, fo. 706, nom. *Godfrey v. Torriano*.

but for his wilful default, as such creditor must have done if he had been a mortgagee, which shews that there was considered to be a distinction between the cases. [The *Vice-Chancellor*.—The Registrar suggests, that the decree would probably shew whether the *elegit* creditor was in that case ordered to account for what he might have received “but for his wilful default” (a). I have always understood that an *elegit* creditor in possession becomes the landlord, and may give the tenants notice to quit.]

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BULL
v.
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Mr. *Rogers* for the debtor.—A tenant by *elegit* has an estate in the land, and although it is not a freehold, and would pass to his executor, it has been said to be in the nature of a freehold. However that may be, there can be no reason why the accounts against him should not be directed in the same manner as against a mortgagee.

Mr. *Swanston*, Mr. *Glasse*, Mr. *Lancelot Shadwell*, and Mr. *Stevens*, appeared for other defendants.

(a) From the decree which was made on July 3, 1737, (Reg. Lib. 1737 A, 704, *Godfrey v. Torriano, Watson v. Godfrey*,) it appears that the judgment-creditors were also mortgagees; and therefore the form of it leaves the question as to the old practice untouched. The bill was filed by the mortgagor against the mortgagees, who had taken an assignment of a judgment debt, and the prayer was for redemption, in the usual form. The decree directed accounts to be taken of what was due in respect of a sum of 2269*l.* 3*s.* 10*d.*, certified to be due from the mortgagor to the mortgagees, by a report in another suit, and

referred it to the Master to compute interest thereupon, and to ascertain what was due to the mortgagees in respect of the costs of obtaining an act of Parliament, and what had been really paid by the mortgagees for the assignment of the judgment debt and interest, and what the mortgagees had necessarily expended in defence of the title, and what they had laid out in necessary buildings, and to take an account of the rents and profits which had been received by the mortgagees or by their order, or which, without their wilful default, might have been so received.

THE COURT SAID:—
 THE COURT SAID:—
 THE COURT SAID:—

The mortgagee's claim was seeking relief under the act of 1847. Whatever might have been the result if there was any before that act passed, I think it was proper to require him to require from the plaintiff a statement to account in the same way as a mortgagee in possession.

The plaintiff submitted to account in that form, and the account was directed accordingly. But the plaintiff's statement being a mere statement, was not to prejudice his right to answer.

The decree, which, for the purpose of costs, was made June 27, 1847, after reciting that the plaintiff submitted to account in the same manner as a mortgagee in possession, directed accounts of the circumstances to which the lands mentioned in the pleadings were subject,—if that was due to the plaintiff for principal and interest on his judgment debt,—and of all sums which had been received by him, or by his agent, or for his use, in respect of the rents and profits of the lands whereof possession had been delivered to him by the sheriff, or what, without his wilful default, might have been so received, and what had been properly laid out and expended by him in repairs.

DENNING v. HENDERSON.

1847.

Jan. 23rd &
Nov. 11th.

MR. BATES, on behalf of a purchaser under the decree, moved, upon the consent of all parties to the cause, that the purchaser might be at liberty to pay his purchase-money into court without accepting the title.

The *Vice-Chancellor*, after consulting the Registrar, said, that the opinion of all the Registrars was, that, as a general rule, the money could not be paid in without the title being accepted.

His Honor, therefore, refused the motion.

On the 25th of January the purchaser gave a written notice to the plaintiffs, that the purchase-money was lying unproductive. The ground on which the purchaser declined accepting the title was, that it was deduced through a deed whereby a trustee purchased from his co-trustee. In September, 1847, the objection was not obviated, and it was then agreed that 13,000*l.*, part of the purchase-money, should be applied in paying off certain incumbrances.

Mr. Bates now moved, upon an affidavit of these facts, that the purchaser might be at liberty to pay the balance into court without interest.

Mr. Toller, for the plaintiffs, referred to the conditions of sale, one of which provided as follows:—

“The purchasers shall pay the amounts of their respective purchase-mones, and of the valuation to be made, pursuant to the fourth condition, into the Bank of England, with the privity of the Accountant-general of the Court of Chancery, to the credit of the cause ‘*Denning v. Henderson*,’ on or before the 10th day of January, 1847,

Held, that a purchaser under a decree could not be permitted to pay his purchase-money into court without accepting the title, although all parties consented, and although the conditions provided, that, if from any cause whatever the money should not be paid by a particular day, the purchaser making default should pay interest from that day. *Held*, also, that the above condition did not render the purchaser liable to pay interest, where he had given notice (as was the fact) that his money was lying unproductive, and the delay arose from the state of the title.

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when the purchases are to be completed, and the respective purchasers to have possession, or be let into the receipt of the rents of their respective lots, as from the 25th day of December, 1846, and up to which day all outgoings will be cleared by the vendors; and if, from any cause whatever, the purchase-money shall not be paid into court on or before the said 10th day of January, 1847, the purchasers making default shall pay interest at the rate of 5*l.* per cent. per annum, from that day, on the amount of his or her purchase-money, until the time of payment."

The VICE-CHANCELLOR:—

The condition requires the purchasers to pay their money into the Bank on or before the 10th day of January, 1847. But I understand, from the officers of the Court, that although this is required by the condition, the purchaser could not, according to the general practice, which is open to rare exceptions, be permitted to pay in the purchase-money without accepting the title. Here the title was not accepted by the time mentioned, from the fault of the vendor, and not of the purchaser. The condition provides, that the purchasers "making default" shall pay interest. Now it does not appear to me that the purchase in this case can be considered as having made "default," and I think it right to make the order for payment without interest^(a).

(a) See *Dempsey v. Dempsey*, next case.

1847.

DEMPSEY v. DEMPSEY.

Dec. 8th.

MR. BEAVAN moved, on behalf of a purchaser, that the purchaser might be at liberty to pay his purchase-money into court, without interest and without accepting the title; and submitted, that the Court would give leave, under the following peculiar circumstances:—

The purchaser bought under conditions of sale in the cause, which provided, that the purchase-money should be paid into court on the 25th of November, 1847. His purchase-money was ready on that day, and had been ready ever since.

Mr. W. W. Cooper, for the plaintiff in the cause, waived all claim to interest, and consented to the application.

Notwithstanding the general rule, the Court may, under special circumstances, permit a purchaser to pay his purchase-money into court before he has accepted the title; but in such case express provision must be made against his taking possession until he shall have accepted the title.

The VICE-CHANCELLOR:—

Though the general rule is, that a purchaser ought not to be permitted to pay his purchase-money into court without having accepted the title, yet, under the special circumstances of this case, I will permit this purchaser to do so; but it must be expressly provided, that he be not let into possession until he shall have accepted the title (a).

(a) A similar order was made by his Honor on the same day, in *Morris v. Bull*, on the motion of Mr. *Nalder*, Mr. *F. Bayley* appearing for the vendors, and Mr.

C. P. Cooper as amicus curiæ, referring to *Hinde v. Dakins* (1 C. P. Coop. Rep. temp. *Cottenham*, 378).

1847.

Dec. 4th & 7th.

GREATREX v. GREATREX.

An injunction granted to restrain the defendant, who had removed the partnership books from the place of business, from keeping them at any other place.

THIS was a suit instituted by two partners against a third, for a dissolution, on the ground of misconduct, and for the usual accounts; and for an injunction to restrain the defendant from, among other things, preventing the plaintiffs from having full access to the partnership books, and liberty to inspect or transcribe the same, and from placing, depositing, and keeping the said partnership books, or any of them, or permitting them, or any of them, to be placed, deposited, and kept at any other place than the partnership premises.

Dec. 4th. Mr. *Speed* moved this day for an injunction as prayed; and an interim order was made, except as to the books, with leave to give notice of motion.

Dec. 7th. Mr. *Russell* and Mr. *Speed* renewed the motion this day, upon notice, no counsel appearing for the defendant. The affidavit in support of the motion deposed, that, between eight and nine o'clock in the morning, before James Frederick Greatrex (one of the plaintiffs) had arrived at the place of business, and the other plaintiff was absent in London, the defendant went to the said place of business, and, on some pretext, sent out two of the apprentices, who were the only persons there; that he then opened the iron chest, in which all the books belonging to the partnership firm were usually kept and then were, and without the knowledge, consent, or privity of the plaintiffs, or either of them, removed and took away from out of the iron chest, and from off the partnership premises, the ledger, day-book, and other books belonging to the firm, in a large box which he had provided for that purpose, and which he had employed a porter, connected with one of the coach-offices in Walsall, to carry away; and that the books were taken

by the defendant away from Walsall; and that the plaintiffs had hitherto been unable to trace the books, or to find out where they had been taken to, save that the defendant, and the porter with the box on a wheelbarrow, were seen in company together on the road to Birmingham, where the plaintiffs believed the books then were.

In support of the motion, *Lane v. Newdigate* (a), and *Whittaker v. Howe* (b), were cited.

The VICE-CHANCELLOR said, that the injunction, as regarded the books, would, in substance, be a direction to bring them back; but that such orders had been made by Lord *Eldon*. And his Honor granted the injunction.

The following was the form of the order, as regards the books:—

“And from hindering or preventing the above-named plaintiffs, or either of them, from having access to the books of the said partnership, and liberty to inspect or transcribe the same, or any of them, when they, or either of them, shall think proper; and from placing and depositing, or keeping the said partnership books, or any of them, or permitting them, or any of them, to be placed, deposited, or kept, at any other place than the place of business of the said partnership, without the consent of the said plaintiffs.”

(a) 10 Ves. 192.

(b) 3 Beav. 388.

1847.
GREATREX
v.
GREATREX.

1847.

Dec. 8th.

HURST v. HURST.

The circumstances, that certain solicitors had acted as the solicitors of a defendant to a foreclosure suit in several other matters, including a suit relating to the estate which was the subject of the foreclosure suit, and that such defendant could not be found, so as to be personally served with a subpoena, to answer the bill of foreclosure:—*Held* insufficient grounds for ordering substituted service on the solicitors to be good service on him.

THIS was a motion on behalf of the plaintiff, made ex parte, that service of the subpoena ad respondendum upon Messrs. Clayton & Cookson, should be ordered to be good service upon one of the defendants, named Hurst.

The suit was an original one for a foreclosure.

The present application was made under the general jurisdiction of the Court.

From the affidavits by which this application was supported, it appeared that repeated ineffectual attempts had been made at all the places at which it was probable that the defendant might be found or heard of, to serve him with the subpoena, and that it was believed that he was keeping out of the way to avoid service. It was sworn that Messrs. Clayton & Cookson were the solicitors for the defendant in several matters, and in particular in a suit in this Court, affecting the estate, the subject of the present suit. It was not positively sworn that the defendant was out of the jurisdiction of the Court, and the affidavits did not raise any presumption that the solicitors had any instructions from Mr. Hurst respecting the present suit, or that they had any general power of attorney from him.

Mr. Bacon, for the motion, referred to *Murray v. Vipart (a)*, and the cases there cited.

The VICE-CHANCELLOR said, that, this being an application to the general jurisdiction of the Court, and not under any of the orders, he thought that, upon the facts and circumstances proved, according to the law and practice of the Court, such an order, as asked, could not be made.

Motion refused.

(a) 1 Phil. 521.

1847.

GOODMAN v. GOODMAN.

Dec. 3rd & 8th.

HENRY GOODMAN, by his will, dated the 23rd of January, 1801, after giving several legacies, gave, devised, and bequeathed all the residue of his estate and effects to four trustees, upon trust to lay out the same in the public stocks or funds of Great Britain, at interest, or upon real or government securities, as they should think most proper, and pay and apply the interest, dividends, and annual proceeds thereof, from time to time as the same should grow due and payable, in manner following; (that was to say), one-seventh part of such interest, dividends, and annual produce to his son Isaac for his life; one other seventh part thereof to his son Philip for his life; one other seventh part thereof to his son Leyon for his life; one other seventh part thereof to his daughter Elizabeth Van Oven, for her life; one other seventh part thereof to his daughter Mary for her life; one other seventh part thereof to his daughter Harriet for her life; and the remaining seventh part to his daughter Rachel for her life; and the testator directed that the shares and interest of his daughters Elizabeth, Mary, Harriet, and Rachel should be for their separate use; and, after the decease of any or either of his said seven children, then, upon trust that the trustees for the time being should stand possessed of so much and such share of the capital of the said residue of his estate, as should constitute the capital or stock from whence such deceased child's or children's share or shares of the interest thereof arose and was produced, upon trust to pay the same unto and amongst all and every the respective child or children of him, her, or them so dying (if more than one, in equal

A testator gave the residue of his estates to trustees, in trust to pay the income to each of his seven children, for life, and after the decease of each of his children in trust to distribute the capital of each deceased child's share among his or her children; and in case any of his children should die without issue living at his or her death, then to divide the interest and capital of such child so dying equally amongst the survivors or survivor of the testator's said seven children, or the issue of such of them as should be then dead, in manner by the will before directed concerning the original shares. The will contained a clause against the alienation of any share. Of the seven children who survived the testator, two died leaving children, and A. and B., two other of the children, successively died without issue:—*Held*, that the share which accrued to B. on A.'s death, followed B.'s original share, and passed to the surviving children of the testator, and the issue of the two children who had died leaving issue.

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shares and proportions), but if but one child, then to such only child the part, share, or proportion of such of them as should be a son or sons, to be paid to him or them on his or their attaining his or their respective age or ages of twenty-one years; and the parts, shares, or proportions of such of them as should be a daughter or daughters, to be paid to her or them on her or their attaining their respective ages or age of twenty-one years, or day of marriage, which should first happen, and in the mean time to be a vested interest in him, her, or them respectively; and, upon further trust, in case any of the testator's said children should die without issue living at their death, or born in due time afterwards, to pay and divide the interest and capital of such child so dying without issue as aforesaid, unto and equally amongst the survivors or survivor of his, the said testator's, said children then living, and the children or issue of such of them as should be then dead, at such times and in such manner as was thereinbefore directed concerning the original shares of the said residue; and the testator directed, that the respective receipts of his, the said children, or the child or children of such deceased child only, should be a good and sufficient discharge and discharges to the said trustees or trustee for the time being, for their said several legacies and annuities, unless any of them should not be resident in Great Britain, in which case it should be lawful for such absent child or children to give his, her, or their power of attorney for the receipt of his, her, or their said respective legacies and annuities; and the testator declared, that, if any of his said children should endeavour to dispose of his, her, or their interest under his, the said testator's, said will, the said testator thereby utterly revoked all and every the bequests thereinbefore made and hereinbefore mentioned, unto or in trust for the benefit of such child or children so endeavouring to dispose of the same, so far as related to him, her, or them; and he directed, that the share and interest of such child

or children should immediately go over to and become vested in the others or other of his, the said testator's, said children, to be divided between them, if more than one, in equal shares and proportions, and if but one surviving child, then to such only child.

The testator died on the 1st of November, 1812, and his will was proved in the Prerogative Court of Canterbury.

The suit was instituted in 1845, by Mary Goodman, the only daughter of Leyon Goodman, deceased, one of the seven children of the testator, against Isaac Goodman, the surviving trustee and executor of the testator, and also one of his seven children, and the other persons claiming to be beneficially interested in the residue under the will. The bill prayed a declaration of the rights of the parties under the will, and a distribution of the residue.

By consent, an order was made in the cause, upon the motion of the plaintiff, referring it to the Master to make preliminary inquiries, and to take the accounts.

The following was found by the Master to be the state of the testator's family:—

Three of the seven children survived; namely, the defendants Isaac, Harriet, and Rachel Goodman.

Leyon Goodman, one of the seven children, died in January, 1832, leaving the plaintiff, Mary Goodman, his only child.

Elizabeth Van Oven, another child of the testator's, died in 1817, leaving three children, Abraham, Rachel, and Barnard Van Oven.

Philip Goodman and Mary Goodman both died unmarried; the former in September, 1832, and the latter in February, 1844.

The executor's accounts were taken by the Master, who, by his report, disallowed some parts of those accounts, as having been dispositions of the testator's residue, made upon an erroneous view of the effect of the testator's will.

The defendant Isaac Goodman, the surviving executor, excepted to the Master's report.

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The cause came on this day upon the exceptions, and generally upon further directions.

Mr. *Russell* and Mr. *J. V. Prior*, in support of the exceptions.

The exceptions were not discussed at length; but all the questions in the cause were raised upon the hearing on the further directions.

The VICE-CHANCELLOR:—

Upon the most reasonable construction of the whole will, Philip's share went to increase the other six shares, subject to the limitations affecting those shares, including the interest given to children and grandchildren, though not then in existence. The same rule will apply to Mary's original share; but then the question is, what is to become of the share which Mary took of Philip's share?

The case was adjourned, that the authorities on this latter question might be looked into.

Dec. 8th. Mr. *Teed* and Mr. *Schomberg*, for the plaintiffs.—The limitations over are sufficient to apply to Mary's accrued interest in Philip's share. As she had no children, it would go over like her original share. This is a fair inference from the clause giving the shares over on alienation.

It must be presumed, that the testator meant the same condition to attach to the accrued share that attached to the original share; and the cases have for a long series of years proceeded on this principle: *Vandergucht v. Blake* (a); *Worldidge v. Churchill* (b); *Milsom v. Awdry* (c); *Barker v. Lea* (d); *Eyre v. Marsden* (e).

(a) 2 Ves. jun. 534.
 (b) 3 Bro. C. C. 465.
 (c) 5 Ves. 465.

(d) 1 T. & R. 413.
 (e) 4 My. & C. 231.

Mr. *Wigram* and Mr. *Waley*, for defendants in the same interest.—The accrued share of Mary was subject to the same limitations as her original share: *Leeming v. Sherratt* (a) is of itself a sufficient authority in support of this proposition.

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Independently, however, of authority, it must be borne in mind that this accrued share is a share of residue, and, if the construction we contend for does not prevail, there is an intestacy as to it, which the Court will endeavour so to give effect to the will as to prevent.

Mr. *Russell*, for the defendant Isaac Goodman, referred to *Pain v. Benson* (b).

The VICE CHANCELLOR:—

I have considered this case since the former argument. In determining the true construction of this will, some weight is due to the presumption against an intestacy; and the clause against alienation, which follows the disposition of the residue, is not wholly beside the question. Giving these considerations their due weight, and attending also to the cases of *Milsom v. Awdry* (c); *Eyre v. Marsden* (d); and *Leeming v. Sherratt* (a), I may venture to put that construction upon the will, which I am satisfied would be conformable to the intention of the testator, if his wishes could be consulted, and declare, that the gift over comprised the accrued share.

No order was made upon the exceptions, and the deposit was ordered to be returned.

It was declared, that, upon the death of Philip Goodman, without leaving issue, his one-seventh part of the residuary estate went to

(a) 2 Hare, 14.

(b) 3 Atk. 78.

(c) 5 Ves. 465.

(d) 4 My. & C. 231.

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increase the shares of the six other children, in the same manner and upon the same trusts as such other children's respective original one-seventh shares; and that, on the death of Mary Goodman, her original one-seventh and her one-sixth of Philip's one-seventh share, went to increase the shares of the five other children.



Dec. 10th &
 22nd.

In the Matter of WILLIAM GRAVENOR,
 AND

In the Matter of THE STAT. 3 & 4 WILL. 4, c. 74.

Form of petition, evidence, and order, on an application to the Court to consent, as protector of a settlement, to the barring of an entail.

THIS was a petition, praying that the Court of Chancery, as protector of a settlement, would consent to bar an entail.

By indentures of lease and release, dated the 21st and 22nd days of November, 1817, and by a common recovery, certain lands were limited, after divers limitations which had failed or determined, to the use of a tenant for life, with remainder to the use of trustees, during the continuance of the life estate, upon trust to preserve contingent remainders, with remainder to the use of the plaintiff and every other son of the tenant for life, successively in tail general, with remainders over. The petitioner was the eldest son of the tenant for life, and attained his age of twenty-one years on the 3rd day of February, 1844.

By various mesne assignments, and ultimately by indentures, dated the 3rd and 4th of November, 1840, the life estate became vested in one William Barnard Heaton.

The petition stated the above facts, and that the tenant for life was convicted of forgery in 1838, and, being sentenced to transportation for fifteen years, was transported to New South Wales, in pursuance of such sentence, which he was then undergoing. That the petitioner was a farmer,

and had recently married, and had entered into an agreement, (subject to the sanction of the Court,) with William Barnard Heaton for the purpose of purchasing the existing life estate. The petition stated the agreement, whereby the petitioner contracted to purchase the prior life estate (subject to the mortgages affecting the property) for 1800*l.*, provided the consent of the Court could be obtained. The petition also stated, that, in addition to the purchase-money, 1045*l.* 4*s.* would be required to stock and farm the premises to advantage, and that the further sum of 160*l.* would be required to furnish the house; that the premises were then in the occupation of a tenant at the rent of 200*l.*, and that it would be of the greatest advantage to the petitioner and his family to carry out the agreement; that the petitioner was qualified to undertake the management of a farm, but had no means of raising the necessary capital, except on the security of his estate in the property of which he was tenant in tail; that, under the trusts of a term of ninety-nine years created by the will of a former owner, the estates had been mortgaged, and that the sum of 900*l.* was then due upon the security of the farm; that the petitioner was desirous of barring his estates tail and vesting the fee-simple of the premises in himself, or of raising a sum of money sufficient to provide funds for the purposes thereinbefore mentioned, by mortgage or otherwise, on the security of the above-mentioned hereditaments and premises.

The prayer was, that the Lord Chancellor would be pleased, as protector of the settlement under the act, to consent to the barring of the estate tail in the petitioner in the messuages, lands, and hereditaments of which the petitioner was then, under or by virtue of the settlement of the 22nd day of November, 1817, tenant in tail in remainder expectant on the decease of the tenant for life; or that his Lordship would be pleased to consent to the petitioner's raising the sum of 3005*l.* 4*s.*, or such sum of money as his Lord-

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ship should think proper, for the purposes above mentioned, by mortgage of the same messuages, lands, hereditaments, and premises, or by such other mortgage as to his Lordship should seem meet, for the purposes aforesaid, or either of them.

The petition was supported by an affidavit of the petitioner in the terms of the statements of the petition, properly verified extracts from parish registers to prove the petitioner's pedigree, a certificate of the conviction, and affidavit of identity.

Dec. 10th. Mr. *Elmsley* appeared in support of the petition, and cited *In the Matter of Wainewright (a)*.

The VICE-CHANCELLOR directed the petition to stand over, for evidence that the sum of 1800*l.*, proposed to be paid for the life estate, was a fair price; and as to the expenses of stocking the farm.

Dec. 22nd. The petition came on again on this day, when

Mr. *Elmsley* produced and read the affidavit of a surveyor as to these points.

The Court made an order to the following effect:—

Enter the affidavits as read. Declare that the tenant for life, having been convicted of felony, as in the petition mentioned, this Court hath, for the purposes of the said act of Parliament, become the protector of the settlement made by the indentures of lease and release of the 21st and 22nd day of November, 1817, and by the recovery in pursuance of the agreement

(a) 1 Phil. 258.

contained in the said indenture of release; and declare that this Court, as such protector, consents to bar the estate of the petitioner as tenant in tail in remainder expectant on the determination of the life estate of the said William Gravenor of and in the several lands, tenements, and hereditaments, mentioned and comprised in the said settlement, so far as is or may be necessary to enable the petitioner to raise the sum of 3005*l.* 4*s.* upon mortgage thereon, (subject, nevertheless, to all prior incumbrances affecting the said premises,) together with the costs, charges, and expenses of this application, and incident thereto and consequent thereon, and also of the said mortgage; and refer it to the Master of this Court in rotation, to approve of and settle a proper deed or assurance for the purpose of so barring the said estate.

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Ex parte STUTELY.

Dec. 14*th.*

BY a deed poll, dated the 31st of August, 1837, Mrs. Bamford, who, under her father's will, was entitled, for her life, to the dividends of a sum of 4000*l.* 3*l.* per cent. Consolidated Bank Annuities, and 4000*l.* 3*l.* per cent. Reduced Annuities, and had a power of appointing the reversion to one or more of her children, appointed that

A married woman, having a general power of appointment over a reversionary trust fund, subject to a previous life estate in another person, appointed

it by way of mortgage, with a power of sale, under which it was afterwards sold. Her husband became bankrupt, and, after the determination of the life estate, the trustees paid the fund into court, under 10 & 11 Vict. c. 96. The purchasers thereupon presented a petition for a transfer of the fund to them. The petition was only served upon the trustees. The Court made the order, subject to a direction that it should not be drawn up for a fortnight, and that the husband's assignees should be served with notice that the fund would be transferred, if no objection were made within that period.

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the trust funds, which were the subject of the power, and were standing in the name of the trustees, should, immediately after her decease, be upon trust for such person or persons, for such interest or interests, for such purposes, and subject to such powers and provisions as her daughter, Harriet Beckett Parker, should, among other modes, by any deed, notwithstanding coverture, appoint; and until, or in default of, and subject to any such appointment, upon trust for the separate use of Harriet Beckett Parker; and that her receipts, or those of her appointees, should be effectual discharges.

By an indenture, dated the 9th of December, 1837, made between Harriet Beckett Parker of the first part, Benjamin Parker (her husband) of the second part, and Thomas Green and Thomas Burton of the third part, Mrs. Parker appointed that the trust funds, comprised in the deed of 31st of August, 1837, should, after the decease of the said S. Bamford, be upon trust for the said T. Green and T. Burton, by way of mortgage, and subject to a proviso for making void the deed on payment of the sum of 2500*l.*, then lent by them to Mrs. Parker, and other monies, and interest at certain times specified; and a power of sale of the sums of stock was thereby limited to Green and Burton, their executors, administrators, and assigns, in case of default being made in payment of the mortgage money at the time specified.

Default having taken place, the mortgagees, on 2nd August, 1844, sold Mrs. Parker's interest in the trust funds to Mr. Martin Stutely and Mr. John Wheelton for 2400*l.*; and, by an indenture, dated 12th of July, 1845, the two sums of stock were assigned to the purchasers absolutely, subject to the life interest therein.

Mrs. Bamford died in May, 1847.

On the 3rd of December, 1847, the trustees of Mr. Beckett's will transferred the trust funds into the name of the Accountant-General, under the 10 & 11 Vict. c. 96. to *ad*

account, intituled "In the matter of the trust of the said will of the said late Mr. John Beckett."

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Messrs. Stutely and Wheelton then presented their petition, praying that the Accountant-General might be ordered to transfer into their names the two sums of stock, with all dividends accrued and accruing due thereon.

The trustees were the only parties served with notice of this petition.

Mr. *Malins* supported the petition.

Mr. *Lewin*, for the trustees, said that Mr. Parker had become a bankrupt, and suggested that his assignees should be served.

The VICE-CHANCELLOR made the order according to the prayer of the petition; but directed that it should not be drawn up for a fortnight; and that the trustees should forthwith serve the assignees of the bankrupt with notice that the fund would be paid out of court at the end of that period, unless the assignees should in the mean time appear and object.

STOOKE v. VINCENT.

Dec. 16th.

THIS suit was instituted for the purpose of obtaining payment of a bond, alleged to have been executed by a Mr. Vincent, and to have been given by him to a Mr. Wheadon, as trustee for the plaintiff. Vincent and Wheadon were both dead, and this bill was filed against the

A witness deposed to having made a copy of a lost bond, and produced a copy, but omitted to identify it as that which he

had made. By the decree, inquiries were directed, among others, as to the circumstances relating to the bond, and whether any debt remained due thereupon:—

Held, first, that it was not fit to insert any direction in the decree, that the witness should be examined before the Master as to the matters included in his first examination; but that a distinct application ought to be made for such an order.

Held, secondly, upon motion subsequently made by the plaintiff to the Court, that the case was a proper one for an order for the witness to be examined *vivâ voce* to the same matters as to which he had been before examined, and generally.

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executors of Vincent, to charge his estate as the debtor; and against the executors of Wheadon, to charge their estate for a breach of trust committed by their testator, in having either parted with or lost the bond.

The executors of Vincent, in their answer, denied all knowledge of the bond.

One of the executors of Wheadon also denied all knowledge of it: but the other executor did not deny all knowledge that there had been such a bond.

The plaintiff examined a witness named Hull, who deposed that he had seen the bond, and had taken a copy of it; and that, from such copy, he had made two other copies. He produced three copies, but did not identify any one of the three as being the copy actually made from the original bond.

The cause came on for hearing on the 17th of February, 1847, when the Court referred it to the Master to inquire and state to the Court, whether the bond, or alleged bond, in the pleadings mentioned, was executed by John Vincent, deceased, in the pleadings named; and, if so, what was become thereof, and whether such bond, if it was executed by the said John Vincent, deceased, had been, and when and by what means, wholly, or to any and what extent, paid off, satisfied, or released; and what, if anything, was due upon such bond, if such bond was executed by the said John Vincent, deceased; and how and by what means, and under what circumstances it had happened that such bond, if it was executed by the said John Vincent, deceased, was not forthcoming, and that the same (if not paid off or satisfied,) was not paid off or satisfied; and whether the plaintiff was, by any and what means, interested, and to what extent and in what manner, in such bond, if it was executed by the said John Vincent, deceased, or in the money, if any, due thereon.

His Honor, in giving judgment, expressed his opinion that it would be satisfactory that the witness Hull should

be examined before the Master; and said, that he thought either party should be at liberty to examine Hull as a witness as to the bond and the copies of it, including the same matters as were the subject of his former examination. But his Honor thought, that, for the purpose of obtaining such a direction, a special application ought to be made, upon which the propriety of such an order being made might be brought more distinctly under consideration.

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Mr. *Rasch* now moved, on behalf of the plaintiff, that he might be at liberty to examine Mr. Hull *vivâ voce* before the Master, as to the matters upon which he had been before examined, and otherwise as the Master should direct. He admitted that a special case was necessary for such an order as he asked; but the Court had already suggested the propriety of such a course; and the answers of the defendants and the evidence of the witness, he submitted, formed of themselves a sufficient ground for taking it.—[He referred to *Rowley v. Adams* (a).]

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Mr. *Oliver* for the defendants, the executors of Vincent.

Mr. *Kennion* for the defendants, the executors of Wheadon.

The VICE-CHANCELLOR thought this a proper case for relaxing the general rule, that a witness should not be re-examined as to matters the subject of his previous examination, and made the order sought.

(a) 1 My. & K. 543.

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Dec. 21st.

MOXHAY v. INDERWICK.

A vendor of freehold property, who, on his own purchase of it, had entered into a covenant to observe the covenants entered into with a former vendor, and which prohibited building on the land, put it up for sale, pursuant to particulars and conditions, noticing the existence of the covenant, but not stipulating that the purchaser should enter into any covenant on the subject. On a bill for specific performance, filed by the purchaser, *Held*, that the plaintiff was not entitled to a conveyance, unless on the terms of giving or providing for the vendor a sufficient indemnity against any breach of the covenant on the part of the plaintiff, his heirs, appointees, or assigns. *Held*, also, that a

THIS was a suit instituted by a purchaser of the pleasure-ground in the centre of Leicester-square, to enforce a specific performance of the contract against the vendor, who declined completing, unless the purchaser entered into certain covenants, to which the latter objected.

The property was put up for sale by auction by Mr. George Robins, on April 25, 1839, pursuant to the following printed particular of sale:—

“Particulars of a very valuable plot of freehold ground, consisting of the extensive pleasure-grounds forming the open plot of the whole of Leicester-square, namely, the valuable land lying within the railing, and containing 3926 square yards, or three-quarters of an acre and ten perches (be it more or less). There is, *malheureusement*, a covenant which restrains the possessor of the fee simple from building on this grand and unrivalled open space: an act of Parliament, however, might remedy the difficulty; and it will perhaps be difficult for an enterprising character to withstand the temptation; but the leading feature is the certainty, that, in the immense improvements which are in full progress, this Square must necessarily be required, or, failing to make suitable terms with the possessor of this valuable land, an extinguisher must, of course, be at once placed upon the ground plan, which is now upon the point of adoption, namely, to communicate Covent-garden with Piccadilly, thus opening a grand thoroughfare to the city of London, and giving to her Majesty a decent and proper line of road when she honours our national theatres with a visit.”

The conditions of sale contained no stipulation as to covenant on the part of the plaintiff, his heirs, executors, administrators, appointees, and assigns, with the defendant, his heirs, executors, and administrators, to the same effect, *mutatis mutandis*, as the covenant entered into by the vendor, on his own purchase, ought to be considered as a sufficient indemnity.

any covenant being entered into on the part of the purchaser. The only condition relating to the conveyance provided, that, upon payment of the balance of the purchase-money, the purchaser should have a proper conveyance, and any other assurance, at his own expense.

Mr. Hyam Hyams, one of the plaintiffs, attended at the sale, and bid for and was declared the purchaser of the plot of ground, at the price of 45*l.* 10*s.* He afterwards sold to the other plaintiff, Mr. Moxhay, his interest under the contract.

It appeared that the defendant derived title to the property from one Charles Elms, to whom it was conveyed by an indenture of release dated the 15th of July, 1808, and made between Charles Augustus Tulk of the one part, and Charles Elms of the other part; whereby, in consideration of 210*l.* paid to Tulk by Elms, Tulk granted, bargained, sold, released, and confirmed unto Elms, his heirs and assigns, all that piece or parcel of ground or garden, commonly called or known by the name of Leicester-square Garden or Pleasure-ground, situate, lying, and being in Leicester-square aforesaid, together with the equestrian statue there standing in the centre thereof, and the iron railings and stone-work round the said garden, with the appurtenances, to hold the same unto and to the use of Elms, his heirs and assigns, for ever; and the release contained a covenant on the part of Elms, for himself, his heirs, executors, administrators, and assigns, with Tulk, his heirs, executors, and administrators, that he, the said Charles Elms, his heirs and assigns, would, from time to time and at all times for ever thereafter, at his and their own charges, keep and maintain the said piece or parcel of ground and square-garden, and the iron railing round the same, in its then present form, and in sufficient and proper repair, as a square-garden and pleasure-garden, and in an open state, uncovered with any buildings, and in neat and ornamental order, and would not take down, or permit or suffer to

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be taken down or defaced, at any time or times thereafter, the equestrian statue now standing in the centre of the said square-garden, but would continue the same in its then present situation and as it then was; and, also, that it should be lawful for the inhabitants of Leicester-square, tenants of the said Charles Augustus Tulk and of John Augustus Tulk, Esq., his father, their heirs and assigns, as well as the said Charles Tulk and John Augustus Tulk, their heirs and assigns, on payment of a reasonable rent for the same, to have keys (at their own expense), and the privilege of admission therewith annually, at any time or times, into the said square-garden and pleasure-ground.

It also appeared, that, in the conveyance of the same premises to the present vendor, from a Mr. Barrow, which was dated the 28th of June, 1834, the present vendor entered into the following covenant:—

“ And the said John Inderwick doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree with and to the said Robert Barrow, his heirs, executors, and administrators, that he, the said John Inderwick, his heirs, executors, administrators, or assigns, shall and will at all times hereafter, observe, perform, and keep all and singular the covenants, conditions, and agreements contained in the said recited indenture of release, of the 15th day of July, 1808, and which thenceforth ought to be observed, and keep harmless and indemnified the said Robert Barrow, his heirs, executors, and administrators, and his and their lands and tenements, goods and chattels, and also the real and personal representative or representatives of the said Charles Elms, deceased, and his and their lands and tenements, goods and chattels, from and against the performance of the said covenants, conditions, and agreements, and from and against all and all manner of actions and suits, cause and causes of actions and suits, costs, charges, damages, claims, and demands whatsoever, for or on account of the same, or in anywise relating thereto.”

The covenant into which the defendant required the purchaser to enter was as follows:—"And the said Hyam Hyams doth hereby for himself, his heirs, executors, and administrators, covenant with the said John Inderwick, his heirs, executors, and administrators, that he, the said Hyam Hyams, his heirs and assigns, shall and will, at all times hereafter, at his and their own costs and charges, keep and maintain the piece or parcel of ground and square-garden hereinbefore appointed and released, and the iron railings round the same, in its present form, and in sufficient and proper repair, as a square-garden and pleasure-ground, and in an open state, uncovered with any buildings, and in neat and ornamental order; and shall not nor will take down, or permit to be taken down or defaced, at any time or times hereafter, the equestrian statue now standing in the centre of the said square-garden, but keep it in its present situation, and as it now is; and also, that it shall be lawful for the inhabitants of Leicester-square aforesaid, tenants of Charles Augustus Tulk, of Duke-street, in the city of Westminster, Esquire, and of John Augustus Tulk, his father, and of their heirs and assigns respectively, as well as the said Charles Augustus Tulk and John Augustus Tulk, and their heirs and assigns respectively, on payment of a reasonable rent for the same, to have keys at their own expense, and the privilege of admission therewith annually, at any time or times, into the said square-garden or pleasure-ground."

At the hearing of the cause, a decree was made, referring it to the Master to approve of a proper conveyance; and the cause now came on upon exceptions taken by the defendant to the report of the Master, who had settled the conveyance without the introduction of any covenant on the part of the plaintiff.

Mr. *Wigram* and Mr. *Miller* in support of the exceptions.—The particulars of sale sufficiently apprised the purchaser of the covenant to which the vendor was subject, and

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against which he is, therefore, without any express agreement to that effect, bound to indemnify the latter in the same way as upon a sale of leaseholds by a lessee who has entered into covenants.

Mr. *Russell* and Mr. *Roundell Palmer*, for the plaintiff.—No authority can be produced to shew that a purchaser of a freehold estate can be called upon to enter into such a covenant as is now required from the plaintiff, in the absence of express stipulation; and the purchaser had a right to consider and to make his bidding on the faith that no such demand would be made, because, although there is a condition as to the conveyance, it is wholly silent as to any covenant being required from the vendor. Nor is such a covenant required for the vendor's protection, his own being one which could not be enforced. [They referred to *Keppell v. Bailey* (a), *Kingdon v. Nottle* (b).]

The VICE-CHANCELLOR:—

I think it not necessary to decide the mere question, whether any action or suit might be sustained against Mr. Moxhay or Mr. Inderwick, upon the covenant contained in the conveyance to Mr. Elms (c); nor is it necessary to consider how the case would have stood, if, instead of the vendor being the defendant, resisting a specific performance, the positions of the parties to the suit were reversed, and the vendor were attempting to force the purchaser to accept a defective title.

It would be unjustifiable to enforce the contract without protecting the vendor from the consequences of the covenant into which he entered with Mr. Barrow. The purchaser, therefore, may have his choice of being relieved from the contract, or of entering into such a covenant as may be necessary for the purpose which I have mentioned.

(a) 2 My. & K. 517.

(b) 1 Mau. & Sel. 355.

(c) This question has now been

decided, as regards a suit in equity, in *Tulk v. Moxhay*, 2 Ph. 774.

The difficulty may be surmounted by the plaintiff entering into a covenant similar to that entered into by the defendant with Mr. Barrow.

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 MOXHAY
 v.
 INDERWICK.

The following was the decree:—On the exceptions (neither allowed nor overruled) and further directions, the plaintiffs electing not to abandon or relinquish the purchase, and plaintiff Hyams waiving all interest in favour of Moxhay, declare the plaintiff Moxhay not entitled to a conveyance from the defendant, unless on the terms of giving and providing for him a sufficient indemnity against any breach or breaches by or on the part of the plaintiff Moxhay, his heirs, appointees, or assigns, of the covenant or covenants relating to the property, contained in the deed of 1839, on the part of the defendant, with Barrow; and declare, that a covenant or covenants, on the part of the plaintiff Moxhay, his heirs, appointees, executors, administrators, and assigns, with the defendant, his heirs, executors, and administrators, to the same effect, *mutatis mutandis*, as the covenant or covenants with Barrow, on the part of the defendant, ought to be considered as a sufficient indemnity for the aforesaid purpose, if contained in the conveyance from the defendant to the plaintiff Moxhay; and, with that declaration, refer it to the Master to review his report, and approve of such indemnity as aforesaid; and the Master is to be at liberty to receive proposals for, and approve a proper provision for preventing such covenant or covenants in the conveyance, if given, from being used for any other purpose than such indemnity as aforesaid.

Reserve further directions and costs.

1847.

Dec. 21st.

KNIGHT v. CAWTHRON.

The bill alleged, that the plaintiffs represented one of four next of kin of an intestate, and prayed the usual administration accounts against the administrator, and the apportionment of one-fourth of the residue, and its payment to the plaintiffs. The plaintiffs served the three other next of kin with copies of the bill, under the 23rd Order of August, 1841. The defendant, the administrator, claimed to be allowed for certain payments out of the intestate's estate, as having been made with the sanction of one of such three next of kin. The Court disallowed an objection by the administrator at the hearing, that the three next of kin who had been served with copies of the bill, but did not appear, were necessary parties, and made a decree in their absence.

THIS was a suit instituted by the executors of a testator, whom they alleged to be one of four next of kin of an intestate, against the administrator of the intestate, for an account of the personal estate, and for an apportionment of one-fourth part of the clear residue, and its payment to the plaintiffs as such representatives of one of four next of kin.

The bill sought no relief against the other three next of kin, but contained the usual prayer under the 23rd Order of the 26th August, 1841, that, upon being served with a copy of the bill, they might be bound by the proceedings in the cause.

These three next of kin had been duly served with a copy of the bill.

The administrator of the intestate by his answer submitted to account, but claimed to be allowed for divers payments, which he alleged had been made by him in the administration, with the sanction of one of the three defendants who had been so served with the copy of the bill.

Mr *Bacon* and Mr. *J. H. Law*, for the plaintiffs.

Mr. *Russell* and Mr. *Nalder*, for the defendant, the administrator, took a preliminary objection.

The defendants, upon whom a copy of the bill had been served, not appearing, the suit cannot properly proceed. The 23rd Order of August, 1841, does not apply to such defendants; and after the claim made by the defendant, the administrator, to be allowed for payments made with the sanction of one of these absent parties, the plaintiffs ought not to have brought the cause to a hearing without making such party at least substantially a defendant: but as to all three of such defendants, the claim of the plaintiffs, as representing one of the next of kin, is in derogation of theirs;

and the administrator has a right to require that all persons who, as the plaintiffs admit, are interested, should be present to settle the rights of the parties and the accounts in this suit.

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Mr. *Bacon* and Mr. *J. H. Law* for the plaintiffs.—No relief having been asked against the three absent next of kin, they come within the precise terms of the Order. [They cited *Powell v. Cockerel* (a), and *Bateman v. Margerison* (b); also *Smith v. Tooley*, a case not reported, in which the circumstances were similar to the present, and the Vice-Chancellor *Wigram* permitted the cause to proceed.]

Mr. *Bates*, *amicus curiæ*, mentioned a recent unreported case of *Davis v. Davis*, which involved similar circumstances, and in which the Vice-Chancellor *Wigram* had disallowed a similar objection.

The case of *Lloyd v. Lloyd* (c) was also cited.

THE VICE-CHANCELLOR:—

There was no adverse interest in the absent parties, in *Bateman v. Margerison*.

Theoretically, the Order so broadly interpreted as is contended by the plaintiffs, might open a door to collusion, from which mischievous consequences might follow; this consideration should induce the Court to put a strict construction upon this Order.

The Order does not say “sought *by the bill*.” The expression is, in general terms, “*sought*.” Now, in this case, what is tantamount to relief against these absent defendants, is at the bar asked and sought to be obtained in the Master’s office. Again, the plaintiffs claim that their testator was one of the next of kin, and they admit one of the absent defendants to be a next of kin. It would be open to her, if present, to contend that she is the sole next of kin.

(a) 4 Hare, 557.

(b) 6 Hare, 496.

(c) 1 Y. & C. C. C. 181.

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On the whole, if I were unfettered by decisions, I should be inclined to allow the objection.

His Honor having subsequently inquired of the Vice-Chancellor *Wigram*, what his decision had been in the unreported cases mentioned at the bar, said, that that learned Judge had no precise recollection of either of the cases; but his opinion was, that in this case the absent defendants were within the provisions of the Order. And his Honor was also informed that the Vice-Chancellor of England had come to a similar conclusion.

His Honor said, he did not feel it right to decide against the opinions of Judges of so much learning and experience.

The cause proceeded, and a decree was made.

1847.
 Dec. 23rd.
 1848.
 Jan. 12th.
 1849.
 Feb. 20th.

BILLING v. WEBB,

AND

In the Matter of 1 WILL. 4, c. 60.

Where the real estates of an intestate were sold under a decree in an administration, and the heir-at-law was a feme covert, who declined acknowledging the conveyance to the purchaser—

Semble, that the heir was a trustee within 1 Will. 4, c. 60.

In such a case, where the costs of the suit exceeded the funds in the cause, the Court directed

the costs of the purchasers, occasioned by the refusal of the married woman to make the acknowledgment, to be first taxed and paid; and, subject thereto, that the costs of plaintiffs and defendants should be taxed and paid rateably.

THIS was the petition of Christopher Darby Griffiths, a purchaser under the decree, praying that some one might be appointed to convey the legal estate in the purchased property, in the place of a married woman, who was the heir-at-law of Ambrose Goswell, the testator in the cause. The testator died intestate as to real estate, and his property was in the course of administration in the suit.

By the report of the Master, dated the 3rd of December, 1845, it appeared that the estates of which Ambrose Goswell was seised or possessed at the time of his decease, consisted of (among others) the property now in question; and that Mary Webb, the wife of James Webb, (both de-

fendants in the cause,) was his only child and heir-at-law. By the order on further directions, dated the 13th of January, 1846, it was, among other things, ordered, that the real estates, which the Master by his report found the said Ambrose Goswell died seised or possessed of, should be sold, with the approbation of the said Master, to the best purchaser or purchasers that could be got for the same, to be allowed of by the Master, wherein all proper parties were to join, as the said Master should direct.

Pursuant to this order, all the parties to the suit, except a defendant named Tarndell, attended before the said Master, by their solicitors, on settling the particulars and conditions of sale.

On the 15th of June, 1846, the Master reported the petitioner as the purchaser of Lot 3, at 200*l*.

On the 6th day of July, 1846, the report was absolutely confirmed; and, on the 6th of August, 1846, the petitioner paid 200*l* 19*s*. 6*d*., being the amount of the purchase-money and interest, into court, pursuant to an order of July 23, 1846, whereby it was declared that all proper parties should join in and execute a proper conveyance of the premises comprised in Lot 3, to the petitioner, or to whom he should appoint.

On the 17th of July, 1846, the draft of the conveyance was sent by the petitioner's solicitor to the solicitor for the plaintiffs, who, on the 31st of the same month, sent the draft to the solicitor of Mr. and Mrs. Webb, in respect of the legal estate of Mrs. Webb, as heiress-at-law, and the draft was accompanied with a memorandum that the conveyance would have to be acknowledged by Mrs. Webb, under the act for the abolition of fines and recoveries.

The draft was returned by Mrs. Webb's solicitor and her husband, who stated on the draft their objections to Mrs. Webb acknowledging the said conveyance, on the ground that such conveyance was not a voluntary conveyance by her.

The draft conveyance was afterwards approved of by

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the solicitor for the plaintiffs, and by the solicitor of Mr. and Mrs. Webb, and on their behalf.

The engrossment, as finally settled, was, on the 23rd of March, 1847, sent by the petitioner's solicitor to the solicitor for the plaintiffs, who, on the 8th of April, 1847, forwarded it to Mrs. Webb's solicitor.

On the 12th of June, 1847, Mr. and Mrs. Webb attended at the office of the plaintiff's solicitor, and executed the conveyance; at which time and place the commissioners for taking acknowledgments of married women also attended, and explained to Mrs. Webb the object of her acknowledging the said deed, and inquired of her whether she intended to give up her interest in the estate in respect of which such acknowledgment was proposed to be taken, without having any provision made for her in lieu thereof, or in return for, or in consequence of, her so giving up her interest in such estate; and, in answer to such inquiry, Mrs. Webb declared that she would not, and refused to make such acknowledgment.

The petition, after stating the above circumstances, prayed for an inquiry before the Master, whether the defendant, Mrs. Webb, was a trustee within the meaning of 1 Will. 4, c. 60, and whether she neglected or refused to convey the hereditaments and premises hereinbefore mentioned for the space of twenty-eight days next after a proper deed for making such conveyance had been tendered for her execution by the petitioner, or by an agent duly authorised by the petitioner; and, if the Master should find that Mary Webb was such trustee, and had neglected or refused to convey such hereditaments and premises for the space of twenty-eight days next after a proper deed for making such conveyance had been tendered for her execution by the petitioner, or by an agent duly authorised by the petitioner, then that the Master might approve of some proper person in the place of Mrs. Webb, to convey, or join in conveying, the said

hereditaments and premises to the petitioner, or as the petitioner shall direct; and that the costs and expenses of and relating to the petition, and any other petition, and to the orders, directions, and conveyances to be made in pursuance of the act, and all reasonable and proper costs incurred by the petitioner in endeavouring to obtain the acknowledgment of the deed by Mrs. Webb, might be raised and paid out of the purchase-money paid into court.

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BILLING
v.
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1 WILL. 4,
c. 60.

Mr. *Henniker*, in support of the petition.—This proceeding is the only one which the purchaser can adopt to obtain a conveyance, the Lord Chancellor having held, that what was in *Stilwell v. Mellersh* (a) held to be the proper course in ordinary circumstances, viz. for the purchaser to move that a proper party to the conveyance, who is also a party to the suit, may be ordered to convey, cannot be adopted in the case of a married woman declining to acknowledge the deed. This was so held in *Jordan v. Jones* (b), where the Lord Chancellor ultimately considered that the Court had no jurisdiction to order a married woman to convey an estate not settled to her separate use. The Lord Chancellor, however, there said, “When once you make a woman a trustee, of course there is no difficulty.” Now, in *King v. Leach* (c), Vice-Chancellor *Wigram* held, that where an estate had been sold under an order of the Court, in a suit instituted by an equitable mortgagee, the mortgagor, who was out of the jurisdiction, was a trustee within the 1 Will. 4, c. 60. And in *Jackson v. Milfield* (d) the same law was held to apply in a creditor’s suit. It is therefore established, that a decree for sale constitutes the party having the legal estate a trustee within the meaning of the act. The same was, in effect, decided in *Robinson v. Wood* (e), and by your Honor in *Jumpson v. Pitchers* (f).

(a) 4 My. & Cr. 581.

(b) 2 Phil. 172.

(c) 2 Hare, 57.

(d) 5 Hare, 538.

(e) 5 Beav. 246.

(f) 1 Coll. 13.

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 v.
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 c. 60.

Mr. *Russell* and Mr. *Chandless* appeared for the plaintiffs in the cause.

Mr. *Wigram* and Mr. *Randall* appeared for the defendants, Mr. and Mrs. Webb.

The VICE-CHANCELLOR referred it to the Master to inquire whether the conveyance was a fit and proper one, and if not, to approve of a fit and proper conveyance; and directed the rest of the petition to stand over, intimating, that, according to his Honor's construction of the act, the petitioner was entitled to an order upon his petition for the execution of a proper conveyance, according to the provisions of the statute 1 Will. 4, c. 60.

The following order was made :—

That it be referred to the Master, to inquire and state whether the conveyance in the petition mentioned was a proper conveyance to be executed and acknowledged by Mrs. Webb under the decree; and, in case he should be of opinion that it was not a fit and proper conveyance to be executed and acknowledged by her, then to approve of a proper conveyance, to be executed and acknowledged by her under the decree and order; and that the rest of the petition should stand over.

In pursuance of the above decree, proceedings were taken before the Master, but he made no report, an agreement having been come to, according to the terms of which the plaintiffs in the cause, and the purchasers of two of the lots, gave Mrs. Webb 8*l.* 6*s.* 8*d.* each, being together 25*l.*, upon which she acknowledged the three purchase deeds. This was not acceded to by Mr. Griffith,

the petitioner above named, who insisted on his right, and refused to contribute to the sum paid to Mrs. Webb.

The cause now came on upon further directions, together with the petition, which Mr. Griffith's counsel obtained leave to have placed in the paper to be disposed of at the same time. Notice was served on the plaintiffs' solicitor, that Mr. Griffith would then ask for the costs of the petition out of his purchase-money, together with his costs, charges, and expenses incurred by the refusal of Mrs. Webb to acknowledge the conveyance.

The funds in the cause were insufficient to pay the costs of the purchasers and the parties to the suit. *Gaunt v. Taylor* (a) and *Roberts v. Thomas* (b) were cited.

Mr. *Russell* and Mr. *Chandless* appeared for the plaintiffs.

Mr. *Wigram* and Mr. *Randall* appeared for the defendants, Mr. and Mrs. Webb.

Sir *F. Simpkinson* for another defendant.

Mr. *H. Stevens* appeared for Mr. Griffith.

Mr. *Torriano* appeared for a purchaser who had contributed towards the 25*l.* paid to Mrs. Webb, and who now appeared upon the usual notice, that his purchase-money would be paid out of court, and asked for his costs.

Mr. *Russell* objected, that the purchaser who had not presented any petition, ought not to have appeared; but, on the Court intimating, that it would give this purchaser an opportunity of presenting a petition, if necessary, he withdrew the objection.

(a) 2 Hare, 413.

(b) Reported in *Tipping v. Power*, 1 Hare, 407, n. (7).

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BILLING
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In re
1 WILL. 4,
c. 60.

The VICE-CHANCELLOR :—

The funds in court in this cause are applicable in the first instance to pay to the purchaser, who has presented the petition, the costs of such petition, and to pay to the purchasers their costs occasioned by the refusal of the heir at law to convey, including, as to the purchasers who contributed towards the 25*l.* paid to Mrs. Webb, the reimbursement of the proportions of that sum advanced by them. The plaintiffs are to be allowed the sum they contributed to make up the 25*l.* to Mrs. Webb.

The costs of all parties to the cause must be taxed and paid rateably, so far as the funds in court will extend; but the 25*l.* paid to Mrs. Webb must be deducted from the costs of the defendants, Mr. and Mrs. Webb.

The order directed payment of the purchasers' costs out of the fund in priority to the costs of the parties to the cause.

June 12th. In the Matter of THE LONDON AND MANCHESTER DIRECT
INDEPENDENT RAILWAY COMPANY (REMINGTON'S LINE),
AND

In the Matter of THE JOINT-STOCK WINDING-UP ACT, 1848.
BASS'S CASE.

Two official
managers of a
company were
appointed

AN order for winding up the affairs of this Company^(a) was made on the petition of James Barker, and the usual under the Winding-up Act, 1848. Upon a motion in court by way of appeal from an order of the Master, counsel appeared on behalf of both official managers; and other counsel also appeared upon different instructions for one of them. The Court stopped the cause until it had ascertained which counsel was instructed by the actual authority of that official manager; and, upon his personally appearing in court, and stating which counsel he had individually authorised, the Court heard that counsel only on his behalf.

Where certain solicitors appeared upon the proceedings to have been appointed by the official managers, and to have been approved of by the Master, the Court permitted affidavits of what had been done to be read in explanation of the proceedings; and, it appearing that the appointment had in fact been made by one official manager only, the Court discharged the order approving of the appointment.

(a) See ante, p. 606.

reference for that purpose was directed to Master Senior, on the 16th of February, 1849.

By his order, dated the 25th of May, 1849, the Master appointed William Turquand and William Lewis official managers of the Company; and he approved of the appointment of Messrs. John & William Galsworthy as solicitors to the official managers; and he directed, that, until further order, the said Messrs. Galsworthy should attend before him in the proceedings to be had in this matter.

By another order, dated the 28th of May, 1849, the Master ordered, that every person in whose custody, possession, or power, any of the books of account, deeds, instruments, cash, bills, notes, papers, and writings, of or belong to the said Company, might be, should, on or before the 31st of May, 1849, or within three days after service of the order, produce and leave at the offices of Messrs. John & William Galsworthy, 2, Charlotte-row, Mansion House, in the city of London, solicitors to the official managers of that estate, all and every of such particulars so in his possession, custody, or power.

This was a motion on behalf of Mr. Bass and Mr. Brooks, two contributories of the Company, that so much of the order of the 25th of May, 1849, as approved of the appointment of Messrs. Galsworthy as solicitors for the official managers, and as directed that they should attend before him on these proceedings, and also, that the order of the 28th of May, 1849, might be discharged.

Mr. Russell and *Mr. W. T. S. Daniel* for the motion.

Mr. Malins and *Mr. Glasse* appeared for *Mr. Turquand* and *Mr. Lewis*, the official managers.

Mr. H. Stevens said, he had been instructed by, and appeared alone for, *Mr. Lewis* on this motion.

1849.

In re
THE LON-
DON AND MAN-
CHESTER DI-
RECT INDE-
PENDENT RAIL-
WAY CO.

BASS'S CASE.

1849.

In re
THE LON-
DON AND MAN-
CHESTER DI-
RECT INDE-
PENDENT RAIL-
WAY CO.

BASS'S CASE.

The VICE-CHANCELLOR:—

Two sets of counsel represent to me that they appear for Mr. Lewis, upon different instructions. I must have the authorities on this point looked into; and the case must stand over for that purpose.

The case stood over accordingly.

Mr. Lewis having in the meantime been sent for, in answer to a question by his Honor, stated, that Mr. *Stevens* alone had been instructed to appear for him in this matter, and that he had not authorised Mr. *Malins* and Mr. *Glasse* to be instructed for him.

The VICE-CHANCELLOR:—

Mr. Lewis having himself informed me that he has authorised Mr. *Stevens* alone, and not Mr. *Malins* and Mr. *Glasse*, to appear for him upon this motion, I can hear no counsel to-day for Mr. Lewis but Mr. *Stevens*, and Mr. *Stevens* I will hear.

Mr. *Stevens* shortly afterwards stated, that the only authority which he had been able to find, was the case of *Butterworth v. Clapham*(a), in which two counsel appeared upon a petition for the same parties, one instructed to consent, and the other instructed by a different solicitor to oppose it, except on certain terms; and in that case the Master of the Rolls directed the petition to stand over, and the authorities under which the solicitors acted to be verified by affidavit. An affidavit was afterwards made by the parties, stating their consent to the petition, and that they had authorised the first solicitor to act for them, upon which the order was made.

The argument on the motion then proceeded.

(a) At the Rolls, April 20, 1820, cited in *Mole v. Smith*, 1 J. & W. 673, in notis.

Mr. *Russell* and Mr. *W. T. S. Daniel*, for the motion.—
The first question is, whether the Master has authority to
appoint a solicitor for the official manager.

The only clause on which the authority can possibly
be contended for is the 23rd section, by which it is
enacted, that “it shall be lawful for the official manager,
with the approbation of the Master, to employ, and from
time to time dismiss, an attorney or solicitor.”

The facts, as they appear upon the affidavits, are these:
that Mr. Turquand and Mr. Lewis were appointed the
official managers, and that Mr. Lewis, thinking the busi-
ness before the Master had terminated, left the office; that,
after he had left, Mr. Turquand alone appointed Messrs.
Galsworthy to be the solicitors, and the entry on the pro-
ceedings was made. The Master, not knowing but that the
act of Mr. Turquand was the act of both the official ma-
nagers, approved of the appointment.

The order of the 28th of May is dependent on that of
the 25th of May, and will fall with it.

Mr. *Stevens*, for Mr. Lewis, supported the motion.

Mr. *Malins* and Mr. *Glasse*.—The right to appeal, by virtue
of which the present motion is made, is given by section
99 of the Winding-up Act, which regulates the proceed-
ings upon which appeals to this Court may be made, in
the following words:—“And upon the hearing of such
appeal, and upon all applications to the Court subsequent
to the order absolute, the proceedings which shall have
taken place before the Master in the matter shall be pro-
duced in court, and no further or other evidence shall,
without express leave of the Court, be used in support of
or against any such appeal, except such proceedings.”

Now, the proceedings which took place before the Master
shew that Messrs. Galsworthy have been appointed the

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In re
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BASS'S CASE.

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 ———
 BASS'S CASE.

solicitors, and they are the only evidence on the question of the validity or propriety of the appointment.

On an intimation by the Court, that the case might stand over, that special leave to read the affidavits may be obtained, this objection was waived.

Mr. *Malins* and Mr. *Glasse*.—At all events, up to this time, Mr. Lewis has done no act repudiating the appointment, which, from the proceedings, it must be assumed that he concurred in making.

The VICE-CHANCELLOR:—

Mr. Lewis's present conduct may deserve censure, or it may entitle him to commendation, or it may be open to neither. Of this I know nothing, and can say nothing; but, as matters are, I must discharge the Master's orders, so far as is asked by this motion.

June 12th.

BARBER'S CASE.

It is within the jurisdiction of the Master to discharge the petitioner, upon whose petition the affairs of a Company are directed to be wound up from any further attendance before him in the proceedings.

Mr. Barber had been the petitioner upon whose petition this Company had been ordered to be wound up before Master Senior.

By the Master's order, dated the 25th of May, 1849, he directed, among other things, that, until further order, the petitioner should be discharged from all further attendance before him in this matter.

This was a motion on behalf of Mr. Barber, that so much of the order of the 25th of May, 1849, as directed his discharge from attendance before the Master, should be discharged.

Mr. *Bacon* and Mr. *J. H. Palmer* for the motion.—By sect. 41 of the Winding-up Act, 1848, it was enacted, that, if the proceedings before the Master, under any order absolute, not being proceedings proper to be taken by the official manager, should not be prosecuted by the petitioner under that act, or other the person having the prosecution thereof, with due diligence, or if for any other reason it should appear advisable, it should be lawful for the Master, upon the application in that behalf of any contributory, to commit to him the further prosecution thereof.

Now, neither want of diligence nor any other misconduct has been imputed to Mr. Barber; and the Master has no power, without some such reason, to discharge Mr. Barber from further attendance before him.

Mr. *Malins* and Mr. *Glasse* opposed the motion, for Mr. *Turquand*, one of the official managers.

Mr. *Stevens* appeared for Mr. *Lewis*, the other official manager.

The VICE-CHANCELLOR:—

I am of opinion that it was and will be within the jurisdiction of the Master to discharge Mr. Barber from further attendance before him; but, as the circumstances under which he made this part of the order have since that time been changed, I will refer it back to the Master to review so much of the order of the 25th of May as refers to Mr. Barber; but it will be competent for him to come again to the conclusion at which he has arrived.

1849.

In re
THE LON-
DON AND MAN-
CHESTER DI-
RECT INDE-
PENDENT RAIL-
WAY CO.

BARBER'S
CASE.

1849.

July 10th.

In the Matter of THE OXFORD AND WORCESTER EXTENSION
AND CHESTER JUNCTION RAILWAY, WITH BRANCHES TO
SHREWSBURY, AND NORTHWICH COMPANY,

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP
Act, 1848.

POTTER'S CASE.

Although the Winding-up Act authorises the Master to require every person to produce documents relating to the Company in his possession, without any express reservation of the rights of lien, this Court cannot interfere to destroy or injure the lien of solicitors, nor adversely order the production of documents on which they have a lien.

AN order had been made, referring it to the Master to wind up this Company, under which the official manager had been appointed.

Messrs. Potter & Collingridge, the petitioners, had been the solicitors for the Company prior to the date of the order for winding up.

An application was made by the official manager to the Master, for an order directing Messrs. Potter & Collingridge to deliver up the books of account, deeds, instruments, cash, bills, notes, papers, and writings of and belonging to the Company, in their custody, to the official manager.

This order having been served on Messrs. Potter & Collingridge, the matter was again brought on before the Master, upon the admitted fact, that divers documents of the Company were in the possession of Messrs. Potter & Collingridge, on which they claimed a lien, under the circumstances appearing by the affidavit of one of those gentlemen, who stated, that there was then due and owing to them from the Company the sum of 190*l.* and upwards, being the balance due to them (after giving specific credit for the sums of 30*l.* 19*s.* 5*d.*, and 53*l.* 18*s.* 2*d.*, cash paid,) for business done and money expended by the solicitors for the Company, upon the retainer of the Company, and for fees and charges due to them in respect thereof; and they claimed to be entitled to and claimed a lien upon all the books of account, deeds, instruments, papers, and writings of and belonging to the Company, then in their cus-

tody, possession, or power, in respect of what was due and owing to them; and they submitted, that they ought not to be compelled to deliver the books of account, deeds, instruments, papers, writings, or any of them, to any person, until they had been paid and satisfied what was so due and owing to them.

After hearing the parties, the Master made the following order, dated the 22nd of June, 1849:—"I, Sir *George Rose*, the Master of the High Court of Chancery charged with the winding up of this Company, do order and direct that the said Company, and George William Killett Potter and Charles Collingridge, both of No. 5, Basinghall-street, in the city of London, gentlemen, each of them do, within eight days from the service hereof, deliver up to William Turquand, the younger, of No. 1, Guildhall Chambers, in the City of London, gentleman, the official manager of this Company, all books of account, deeds, instruments, cash, bills, notes, papers, and writings, of and belonging to the said Company, in their, any, or either of their custody, possession, or power."

The time limited for the delivery of the documents was extended to eight days instead of four, to give to Messrs. Potter & Collingridge the opportunity of appealing to this Court from the order.

This was a motion to discharge the order.

Mr. T. H. Terrell for the motion.—The powers of this act cannot be put in force so as to deprive a solicitor of his lien. Your Honor has held, that the powers conferred on commissioners of bankrupt, which are equally large, do not authorise them to prejudice the solicitor's right: *Ex parte Underwood* (a).

Mr. Cairns, for the official manager.—The official manager has no funds out of which he can pay to these soli-

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(a) 1 De Gex, 190.

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 ———
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citors the amount of their lien; and the order of this Court for winding up this Company cannot be prosecuted if the claim of lien is to prevail.

Again, the provisions of the Winding-up Act, by sect. 29, vest all the effects of the Company absolutely in the official manager, and, by sect. 63, authorise the Master to require every person to produce any documents in his possession; and there is no reservation of the rights of lien.

It is submitted, therefore, that the production of the documents may be ordered; and such an order will not destroy any lien which these solicitors may have.

The VICE-CHANCELLOR:—

I understand that the Master made the order for the purpose of having the question raised and decided here. These solicitors have not discharged themselves. I cannot interfere to destroy or prejudice their lien, and I must discharge the order.

July 10th. Mr. *Cairns* afterwards asked, on behalf of the official manager, that the order discharging the order of the Master might not be drawn up, on the official manager entering into an undertaking to pay what, upon taxation of the solicitor's bill, should appear due to him out of the first monies coming to the hands of the official managers.

The VICE-CHANCELLOR, without hearing Mr. *T. H. Terrell*, who appeared for the solicitors, said, that he could not compel them to be satisfied with such an undertaking.

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AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP
ACT, 1848.

IN May, 1845, a Company, under the name of the Direct London and Manchester Railway Company, was provisionally registered, as required by the Registration Act of the 7 & 8 Vict. c. 110.

The capital was to be 5,000,000*l.*, divided into 100,000 shares of 50*l.* each.

The deposit required to be paid in respect of each share so allotted was 5*l.* 5*s.*, and a subscribers' agreement and a parliamentary contract were prepared, and were each dated 29th of September, 1845. The subscribers' agreement was executed by subscribers to the extent of 87,000 shares and upwards, who were stated to have previously paid to the directors 5*l.* 5*s.* in respect of each share, amounting altogether to 460,000*l.*

The petitioner had executed the subscribers' agreement and parliamentary contract in respect of thirty shares allotted to him, and on which he paid the deposit. Another Company was at the same time provisionally registered, under the title of the Direct Independent London and Manchester Railway Company (*a*), and having the same objects as the former.

In a provisionally registered Railway Company, 88,400 shares were allotted, the deposit being 5*l.* 5*s.* per share. On the bill being thrown out in the House of Commons, on the Standing Orders, and the directors abandoning the undertaking, 8*l.* 10*s.* per share was returned to the holders of 88,375 shares, who thereupon delivered up their scrip certificates, and took fresh ones purporting to entitle the holders to a pro rata division of the funds remaining after settling the claims on, and

the liabilities of, the Company. The holders of 87,940 of these new certificates received a further instalment of 10*s.* per share, and signed a release, admitting a certain balance only to be then in the hands of the directors.

An original holder of thirty shares, who received the former, but not the latter instalment, presented a petition to have the Company wound up under the Winding-up Act, alleging a refusal or neglect, on the part of the directors, to produce accounts, and alleging a misapplication of 15,000*l.* on payment of a deposit on an agreement for the purchase of land, contrary to the Registration Act:—*Held*, not a case for making at once an order to wind up the Company, or even, without further materials, for a reference to the Master under the section, as to the expediency of winding up the Company.

But, it appearing that the petitioner's application to see the accounts had not been attended to, the petition was ordered to stand over, to give him an opportunity of seeing them.

(*a*) See ante, p. 722.

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On the 25th of October, 1845, an arrangement for the amalgamation of the two Companies was concluded between the two managing committees, and a memorandum in writing of that date, in duplicate, of the terms and conditions of the amalgamation, was signed on behalf of the Companies by their respective chairmen, providing, among other things, that, until the bill or bills should have passed for making one of the lines, the funds of the two Companies should be kept separately, and should be under the exclusive control of their respective directors for the time being; and that none of the directors of either Company, although sitting at the same board, should vote upon any question of finance, in which the capital and funds of the other Company, or the disposal thereof, should be concerned; and that, from the 27th of September then last, until the bill or bills should have passed, all costs, charges, and expenses, parliamentary or otherwise, (whether incurred in the next or any subsequent session of Parliament, and whether the attempts to obtain an act or acts should fail or not,) were to be paid by the Companies in equal moieties; and, for that purpose, a common fund was to be provided by the joint and equal contributions from time to time of each Company, out of which such costs, charges, and expenses were to be from time to time defrayed, such common fund to be under the control of the board of twenty-four directors.

The petition, and the affidavit in support of it, stated, that the directors had, out of the 460,000*l.* arising from the subscriptions, paid 15,000*l.* as a deposit on the purchase of land at Manchester, for the purposes of a terminus for the Company, and also large sums of money for costs and expenses, amounting in the whole to the sum of 100,000*l.* and upwards.

That the bill in Parliament was thrown out on the Standing Orders, and that the petitioner had applied at the office of the Direct London and Manchester Railway Company for information as to the steps intended to be

taken by the directors, and an inspection of the accounts of the Companies, but could obtain no information relative thereto; and that he thereupon, and at the request of numerous shareholders in the Company, convened a meeting of the parties interested in both Companies, by advertisements, in April, 1846, at which resolutions were carried, to the effect, that it was for the interest of the shareholders that the affairs of the Companies should be wound up, and the deposits, less the fair expenses, returned at the earliest possible period, and requesting the directors to wind up the affairs and to return the deposits, less the fair expenses, at the earliest possible period, and stating, that the shareholders protested against any further expenses being incurred in prosecution of the undertaking, and that they would, after that protest, object to and disallow further expenses, if any.

That a copy of the minute of this resolution was forwarded to the directors.

That, after some further communication, the petitioner wrote as follows:—

“To Sidney M. Hawkes, Esq., secretary to Direct London and Manchester Railway Company.

“Sir,—Yours of the 23rd instant, stating that you were instructed to request that any application I might wish to make to the provisional directors of the Direct London and Manchester Railway Company, should be made in writing, induces me to remind you that I did, on the 12th May last, in my individual capacity of a shareholder in the Company, apply to you for an inspection of the deeds signed by me, and also of the agreement entered into with Remington’s Company, and that you, as secretary, promised to submit such request to the directors, and favour me with their reply; but that I have not received any answer to that application. My further request, made to you as secretary to the Company, on the 23rd instant, was for the production, for my inspection and examination,

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of the accounts of the receipts and payments of the directors on behalf of the Company, with the bills and vouchers, or that you would appoint a time when I might examine the same. I shall be obliged by your submitting this letter to the directors, and informing me when and where I may inspect the documents and accounts required; or, should they refuse to permit the inspection of any of them, then their reasons for such refusal. Understanding that there will be a meeting of the directors to-morrow, I hope to receive an answer in the course of that day.

“June 26, 1846.

“ТНОС. РОСОСК.”

In answer to this letter, the petitioner received the following letter from the secretary:—

“London, June 27, 1846.

“Sir,—I beg to acknowledge the receipt of your letter of yesterday’s date, received this day, which I will lay before the Board at its next meeting. You are in error in supposing that the Board was appointed to meet to-day. Such is not the fact, nor (owing to the great pressure upon the officers of the Company, under present circumstances, their time being wholly engaged in carrying into effect the resolutions for winding up the affairs of the Company) is the day for the next meeting yet fixed.

“I cannot allow your letter to pass without reminding you, that, in your interview with me on the 12th May, it was understood between us, that you should apply personally for an answer to your request, that you might be allowed to inspect the deeds of the Company. I stated your request to the Board at its then next meeting, and received instructions to permit you to inspect the deeds which you had signed. You failed to apply for any answer to your request until the 23rd of this present month. I then reported to you my instructions, as above mentioned, and distinctly offered to you an inspection of those

deeds, either then or at any other convenient time. You did not avail yourself of this offer.

"Your further request, contained in your letter above acknowledged, to inspect and examine the accounts of the receipts and payments of the directors, shall be submitted to the Board at its next meeting. I am, Sir, yours truly,

"SIDNEY M. HAWKES, *Secretary.*"

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In August, 1846, the directors proceeded to divide among the shareholders part of the deposits, to the extent of 3*l.* 10*s.* on each share, and this amount was paid on the thirty shares allotted to the petitioner, who took thereupon the following certificate:—

"1262.—The Direct London and Manchester Railway Company (provisionally registered).

"Offices, 48, Moorgate-street, London.

"The holder of this certificate, having delivered up scrip for thirty shares in this Company, in consideration of having received 3*l.* 10*s.* per share, preparatory to the winding up of the Company, is entitled to a pro rata division of the funds which remain, after the settlement of the claims on, and the liabilities of, the Company.

"WM. LAWRENCE, } *Provisional*
 "WM. WHITE, } *Directors.*

"Entd., S. M. HAWKES, *Secretary.*

"*London, August 8, 1846.*"

The petition, and the affidavit in support of it, also stated that the directors, in the year 1848, made a further dividend of 10*s.* per share among such of the shareholders as would agree to execute, and did execute, a release and indemnity; but that the petitioner never in any manner, in respect of his thirty shares, acquiesced in the last-mentioned division, release, or indemnity, or accepted the instalment of 10*s.* or any part thereof; and that he had received no further answer to his application than the above letter

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of the 27th of June, 1846; and that there were, as the petitioner believed, liabilities of the Direct London and Manchester Railway, for which the members of the Company were or might be made liable.

The prayer was for the usual winding-up order.

In opposition to the petition, two of the directors deposed, that the two Companies were separate, and that each kept its own funds, and conducted its own separate affairs, subsequently to the agreement for amalgamation, in the same manner as had been done before the agreement; nor was there any admixture of their funds, but that separate bankers were employed, and a separate account opened as to the expenses of the application to Parliament, provided for by the said agreement; and that such separate account was supplied with funds by the separate payments of each Company. That, as soon as the bill had failed before the Standing Orders' Committee, the directors proceeded to make arrangements for winding up the affairs of the Company as speedily as possible, and getting in an account of all the claims and demands upon the Company; but, that it being afterwards found that there were various claims which could not then be adjusted, they determined at once to return 3*l.* 10*s.* per share to their shareholders. That, with regard to the applications made by the petitioner to inspect the accounts, such applications related to the accounts of the two Companies, which the provisional directors could not comply with; and that they believed that the shareholders of the Direct Independent London and Manchester Railway Company, or some of them, and other parties, were desirous to amalgamate the funds of the one railway Company with the other, for which there were no just grounds, and which the provisional directors considered themselves bound in justice to their constituents to prevent.

That the holders of 88,375 shares out of 88,440, which were all that were issued, received the instalment of 3*l.* 10*s.*

per share, including, (as the deponents believed,) the thirty shares allotted to the petitioner; and that the scrip certificates of all these 88,375 shares were delivered up to, and were then remaining in the hands of the directors.

That holders representing 87,940 shares, (out of the 88,375 shares, for which the certificates had been issued,) accepted the further payment of 10s. per share, and signed a memorandum in the following form:—

“Whereas the above-mentioned provisional directors have a balance of 65,279*l.* 3*s.* 3*d.* now remaining in their hands, but certain claims and liabilities of the Company are still outstanding and unsettled; and whereas the directors have been urgently requested to make a further return out of the said balance, in which request I concur, and the directors have accordingly consented to pay to the parties entitled thereto, out of the said balance, a further sum, equal to 10s. per share, upon their several certificates: I, the undersigned, being so entitled in respect of — certificates for — shares, do hereby express my concurrence in the settlement of the Company’s affairs made by the said directors, which has resulted in the said balance of 65,279*l.* 3*s.* 3*d.* I therefore hereby consent to receive the sum of — pounds — shillings, (being after the rate of 10s. per share upon my certificates), and such other pro ratâ division of the balance which may ultimately remain in their hands upon the final winding up the affairs of the said Company, in satisfaction and discharge of my said certificates, and all claims upon the said provisional directors. And in consideration of the said payment to me, I hereby undertake to repay to the said provisional directors, or the survivor of them, the whole of the said sum of —, or such pro ratâ part thereof, as may be necessary to reimburse the provisional directors, or the survivors of them, such sums of money as may be recovered against them or any of them, or which they may be liable to pay, and which

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the balance that may then be in their hands may not be sufficient to satisfy, the sum of —, now received by me.

Name in full—

Place of abode—

Description—

Date—

Signature—.”

The respondents deposed, that, amongst the number of these 87,900 shares, were twenty of the thirty original shares issued to the petitioner; and that the holders of the certificates representing these 87,900 shares, on receiving the said 10s. per share, received from the provisional directors a second certificate in the following form:—

“ Four pounds per share having been already returned, the holder of this certificate is entitled, in respect of such certificate, to a pro ratâ division of so much of the balance of 21,059*l.* 3*s.* 3*d.* now remaining in the hands of the provisional directors as shall be left after the claims and liabilities of the Company shall have been settled, and the affairs finally wound up.”

That, by the payment of the sum of 10s. per share, the balance of 65,279*l.* 3*s.* 3*d.*, (being the balance in the hands of the directors previously to the last-mentioned payment being made,) was reduced to 21,059*l.* 3*s.* 3*d.* That, by the aforesaid means, the whole of the original scrip or shares issued by the said Direct London and Manchester Railway Company, excepting sixty-five, had been returned to, and were then in, the possession of the said provisional directors; and, as to the sixty-five shares, fifty-five of them were, as the deponents believed, lost, and no claim in respect of them had ever been made; and that the holder of the remaining ten shares concurred in and approved of the winding up of the affairs of the Company by the directors, and not

under the Joint-stock Companies Winding-up Act, and was ready and willing to receive the amounts paid, and equal payments with others, and deliver up his original shares to the directors to be cancelled. The two directors further deposed, that the assets of the Company then consisted of 25,500*l.* Three per cent. Consols, and the dividends thereon, and 502*l.* 19*s.* 1*d.* cash, in the hands of the bankers, to the credit of the provisional directors; and also, of a sum of 4990*l.* 15*s.* 10½*d.*, being the proportion of the balance of expenses of prosecuting the bill in Parliament, not paid by the directors of the Direct Independent London and Manchester Railway Company.

That the only outstanding demand against the Direct London and Manchester Railway Company was a claim of 2000*l.*, on the part of Mr. Rastrick the engineer, which claim had only recently been made, and was then under discussion, the same being not in respect of his own engineering bill, but being the amount of a verdict and costs obtained against him by one of the parties engaged under him on the line of railway; but that Mr. Rastrick's own engineering bill had been settled and paid. That, as soon as the last-mentioned claim had been settled, the directors would be prepared to divide the balance in their hands amongst the certificate holders, and finally close.

Mr. *Bacon* and Mr. *J. H. Palmer*, in support of the petition.—As the petitioner has never signed any release, but has only received back 3*l.* 10*s.* on account, he has a right to have the accounts taken, and to be protected from future liability under the provisions of the act. It can make no difference that the holders of the majority of the shares have chosen, without an examination of any accounts, to sign papers expressive of their satisfaction, and admitting the correctness of the statement of the balance which the directors have represented to be in their hands. This is not a case in which the majority have power to

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mit that this description is as little applicable as the others.

But, even supposing the Court has jurisdiction under the act, and that the petitioner had not precluded himself from presenting a petition, still the order is within the discretion of the Court; and when the Court sees, that, out of the holders of 88,400 shares, a person claiming to hold thirty only is the only one who does not concur in the settlement already made, and that he has received back his whole deposit, except something less than 50*l.*, a considerable proportion of which must, in any event, be fairly deducted for expenses, it will not, for the sake of so small a subject of dispute, harass those who have a much greater interest in the matter, by putting them to the expense and trouble of recommencing the adjustment of the Company's affairs.

Mr. Bacon in reply.

The VICE-CHANCELLOR:—

The small amount of the pecuniary interest of the only petitioner in this matter, considering the evidence that there is as to the extent of the liabilities of the Company, is a circumstance, I think, not unworthy of notice upon the present occasion. I do not, however, mean to represent it as decisive. Another circumstance worthy of attention, though also not decisive, is the time at which this petition was presented, namely, the present month of May, the act under which it was presented having received the royal assent in the month of August last, considering especially the various transactions and events that took place with regard to this Company before the act had received the royal assent.

The 12th section of the act, amongst other things, enables the Court, upon such a petition as the present, to

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refer it to the Master, to make preliminary inquiries as to the necessity or expediency of the dissolution and winding up, or of the winding up of a Company; and, in case it should appear, from the report upon the reference, that the dissolution and winding up, or the winding up of the Company under the act, is necessary or expedient, to make the order absolute, which the act mentions. And the 14th section enables the Court, upon the hearing of such a petition, either originally, or subsequently on further directions, to dismiss the petition, with or without costs.

Now, considering the various transactions that have taken place (it is unnecessary to recapitulate them) before this act was passed, commencing no earlier than the year 1846, I think it quite clear, that the utmost extent to which the Court could by possibility with propriety assist the petitioner upon the present occasion, would be to refer it to the Master to consider whether it is necessary or expedient that the Company should be wound up under the act.

The Court, however, I apprehend, ought not to make such an order, if the materials before it are such as, in the opinion of the Court, to shew that the winding up of the Company under the act is not necessary or expedient; and, upon the materials now before me, I should have been of opinion that it was not necessary or expedient that the winding up of the Company should take place under the act, but for a single consideration, namely, that the accounts have not been produced to this petitioner.

If the accounts had been produced to the petitioner, and nothing unreasonable, nothing plainly improper, had been exhibited upon them, I should have dismissed the petition, upon the undertaking which the respondents were willing to give, to indemnify the petitioner from the demand—a demand of between 2000*l*. and 3000*l*.—which has been mentioned—and to pay him, if he would accept it, the 15*l*.

of which mention has also been made. I consider the respondents bound, if the Court shall think it necessary to require such an undertaking from them hereafter, to give it. The accounts not having been produced, I do not think it fit at present to dismiss the petition; but I will allow it to stand over, if the directors will undertake to produce the accounts to this petitioner. Are they willing to do so?

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Mr. Malins.—Certainly, and they always have been.

The VICE-CHANCELLOR:—

Then let their accounts be produced to him—let him have an opportunity of bringing any matter arising upon them before the Court; but if I remain of my present opinion, there must be something strong and plainly material upon them, of an objectionable nature, to induce me to act upon this petition in the particular circumstances of the case. Let the petition stand over, with liberty to mention it again.

The petitioner has received back all but 50 guineas, and he may have 15*l.* more. It is quite clear that there must be some deduction from the 150 guineas subscribed by him; and, that being so, it is to a very small amount of contention that the dispute is reduced, if I am right in the inference that the fear of outstanding liabilities is a shadow, there being an undertaking from the respondents to indemnify against the demand connected with *Mr. Rastick*.

Let the accounts be inspected. Then, if either party shall think it worth while to bring the petition on again, let him do so.

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of the 27th of June, 1846; and that there were, as the petitioner believed, liabilities of the Direct London and Manchester Railway, for which the members of the Company were or might be made liable.

The prayer was for the usual winding-up order.

In opposition to the petition, two of the directors deposed, that the two Companies were separate, and that each kept its own funds, and conducted its own separate affairs, subsequently to the agreement for amalgamation, in the same manner as had been done before the agreement; nor was there any admixture of their funds, but that separate bankers were employed, and a separate account opened as to the expenses of the application to Parliament, provided for by the said agreement; and that such separate account was supplied with funds by the separate payments of each Company. That, as soon as the bill had failed before the Standing Orders' Committee, the directors proceeded to make arrangements for winding up the affairs of the Company as speedily as possible, and getting in an account of all the claims and demands upon the Company; but, that it being afterwards found that there were various claims which could not then be adjusted, they determined at once to return 3*l.* 10*s.* per share to their shareholders. That, with regard to the applications made by the petitioner to inspect the accounts, such applications related to the accounts of the two Companies, which the provisional directors could not comply with; and that they believed that the shareholders of the Direct Independent London and Manchester Railway Company, or some of them, and other parties, were desirous to amalgamate the funds of the one railway Company with the other, for which there were no just grounds, and which the provisional directors considered themselves bound in justice to their constituents to prevent.

That the holders of 88,375 shares out of 88,440, which were all that were issued, received the instalment of 3*l.* 10*s.*

per share, including, (as the deponents believed,) the thirty shares allotted to the petitioner; and that the scrip certificates of all these 88,375 shares were delivered up to, and were then remaining in the hands of the directors.

That holders representing 87,940 shares, (out of the 88,375 shares, for which the certificates had been issued,) accepted the further payment of 10s. per share, and signed a memorandum in the following form:—

“Whereas the above-mentioned provisional directors have a balance of 65,279*l.* 3*s.* 3*d.* now remaining in their hands, but certain claims and liabilities of the Company are still outstanding and unsettled; and whereas the directors have been urgently requested to make a further return out of the said balance, in which request I concur, and the directors have accordingly consented to pay to the parties entitled thereto, out of the said balance, a further sum, equal to 10*s.* per share, upon their several certificates: I, the undersigned, being so entitled in respect of — certificates for — shares, do hereby express my concurrence in the settlement of the Company’s affairs made by the said directors, which has resulted in the said balance of 65,279*l.* 3*s.* 3*d.* I therefore hereby consent to receive the sum of — pounds — shillings, (being after the rate of 10*s.* per share upon my certificates), and such other pro ratâ division of the balance which may ultimately remain in their hands upon the final winding up the affairs of the said Company, in satisfaction and discharge of my said certificates, and all claims upon the said provisional directors. And in consideration of the said payment to me, I hereby undertake to repay to the said provisional directors, or the survivor of them, the whole of the said sum of —, or such pro ratâ part thereof, as may be necessary to reimburse the provisional directors, or the survivors of them, such sums of money as may be recovered against them or any of them, or which they may be liable to pay, and which

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the balance that may then be in their hands may not be sufficient to satisfy, the sum of —, now received by me.

Name in full—

Place of abode—

Description—

Date—

Signature—.”

The respondents deposed, that, amongst the number of these 87,900 shares, were twenty of the thirty original shares issued to the petitioner; and that the holders of the certificates representing these 87,900 shares, on receiving the said 10s. per share, received from the provisional directors a second certificate in the following form:—

“ Four pounds per share having been already returned, the holder of this certificate is entitled, in respect of such certificate, to a pro ratâ division of so much of the balance of 21,059*l.* 3*s.* 3*d.* now remaining in the hands of the provisional directors as shall be left after the claims and liabilities of the Company shall have been settled, and the affairs finally wound up.”

That, by the payment of the sum of 10s. per share, the balance of 65,279*l.* 3*s.* 3*d.*, (being the balance in the hands of the directors previously to the last-mentioned payment being made,) was reduced to 21,059*l.* 3*s.* 3*d.* That, by the aforesaid means, the whole of the original scrip or shares issued by the said Direct London and Manchester Railway Company, excepting sixty-five, had been returned to, and were then in, the possession of the said provisional directors; and, as to the sixty-five shares, fifty-five of them were, as the deponents believed, lost, and no claim in respect of them had ever been made; and that the holder of the remaining ten shares concurred in and approved of the winding up of the affairs of the Company by the directors, and not

under the Joint-stock Companies Winding-up Act, and was ready and willing to receive the amounts paid, and equal payments with others, and deliver up his original shares to the directors to be cancelled. The two directors further deposed, that the assets of the Company then consisted of 25,500*l*. Three per cent. Consols, and the dividends thereon, and 502*l*. 19*s*. 1*d*. cash, in the hands of the bankers, to the credit of the provisional directors; and also, of a sum of 4990*l*. 15*s*. 10½*d*., being the proportion of the balance of expenses of prosecuting the bill in Parliament, not paid by the directors of the Direct Independent London and Manchester Railway Company.

That the only outstanding demand against the Direct London and Manchester Railway Company was a claim of 2000*l*., on the part of Mr. Rastrick the engineer, which claim had only recently been made, and was then under discussion, the same being not in respect of his own engineering bill, but being the amount of a verdict and costs obtained against him by one of the parties engaged under him on the line of railway; but that Mr. Rastrick's own engineering bill had been settled and paid. That, as soon as the last-mentioned claim had been settled, the directors would be prepared to divide the balance in their hands amongst the certificate holders, and finally close.

Mr. *Bacon* and Mr. *J. H. Palmer*, in support of the petition.—As the petitioner has never signed any release, but has only received back 3*l*. 10*s*. on account, he has a right to have the accounts taken, and to be protected from future liability under the provisions of the act. It can make no difference that the holders of the majority of the shares have chosen, without an examination of any accounts, to sign papers expressive of their satisfaction, and admitting the correctness of the statement of the balance which the directors have represented to be in their hands. This is not a case in which the majority have power to

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bind a person who does not accede to their views. The petitioner has never had the accounts produced to him; his petition points out one breach of trust, of which the directors have been guilty, that of making a large payment for the site of a station, which it is illegal for a Company only provisionally registered to do. This payment, of course, the directors have allowed to themselves in stating the balance in their hands; and, although every other shareholder should permit them to do so, it would not prejudice the right of the petitioner to have the accounts taken upon a proper footing.

Mr. *Rolt*, Mr. *Malins*, Mr. *Hoggins*, and Mr. *Glasse*, for the directors who were respondents.—The original contract between the scripholders and directors was at an end when they delivered up their scrip certificates and received the first instalment of 3*l.* 10*s.* They then took fresh certificates and entered into a new contract, determining all former stipulations and substituting a simple one for distribution by the directors of the balance then remaining in their hands among the holders of the new certificates, according to the proportions therein specified. Therefore, all circumstances antecedent to this transaction are immaterial. The petitioner has nothing but certificates entitling him to the benefit of the second contract, which amounted in substance to a sale of the original scrip certificates for a valuable consideration. The document, signed by those who received the first instalment, was an effectual adjustment up to the time of its date.

The only one of the eight cases specified in the 5th section of the act, within which it can be attempted to bring the present Company, is the 7th. But this Company has not been dissolved; nor has it ceased to carry on business, for it never carried on any business. Therefore, the only remaining question is, whether it is “carrying on business for the purpose of winding up its affairs.” We sub-

mit that this description is as little applicable as the others.

But, even supposing the Court has jurisdiction under the act, and that the petitioner had not precluded himself from presenting a petition, still the order is within the discretion of the Court; and when the Court sees, that, out of the holders of 88,400 shares, a person claiming to hold thirty only is the only one who does not concur in the settlement already made, and that he has received back his whole deposit, except something less than 50%, a considerable proportion of which must, in any event, be fairly deducted for expenses, it will not, for the sake of so small a subject of dispute, harass those who have a much greater interest in the matter, by putting them to the expense and trouble of recommencing the adjustment of the Company's affairs.

Mr. Bacon in reply.

The VICE-CHANCELLOR:—

The small amount of the pecuniary interest of the only petitioner in this matter, considering the evidence that there is as to the extent of the liabilities of the Company, is a circumstance, I think, not unworthy of notice upon the present occasion. I do not, however, mean to represent it as decisive. Another circumstance worthy of attention, though also not decisive, is the time at which this petition was presented, namely, the present month of May, the act under which it was presented having received the royal assent in the month of August last, considering especially the various transactions and events that took place with regard to this Company before the act had received the royal assent.

The 12th section of the act, amongst other things, enables the Court, upon such a petition as the present, to

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refer it to the Master, to make preliminary inquiries as to the necessity or expediency of the dissolution and winding up, or of the winding up of a Company; and, in case it should appear, from the report upon the reference, that the dissolution and winding up, or the winding up of the Company under the act, is necessary or expedient, to make the order absolute, which the act mentions. And the 14th section enables the Court, upon the hearing of such a petition, either originally, or subsequently on further directions, to dismiss the petition, with or without costs.

Now, considering the various transactions that have taken place (it is unnecessary to recapitulate them) before this act was passed, commencing no earlier than the year 1846, I think it quite clear, that the utmost extent to which the Court could by possibility with propriety assist the petitioner upon the present occasion, would be to refer it to the Master to consider whether it is necessary or expedient that the Company should be wound up under the act.

The Court, however, I apprehend, ought not to make such an order, if the materials before it are such as, in the opinion of the Court, to shew that the winding up of the Company under the act is not necessary or expedient; and, upon the materials now before me, I should have been of opinion that it was not necessary or expedient that the winding up of the Company should take place under the act, but for a single consideration, namely, that the accounts have not been produced to this petitioner.

If the accounts had been produced to the petitioner, and nothing unreasonable, nothing plainly improper, had been exhibited upon them, I should have dismissed the petition, upon the undertaking which the respondents were willing to give, to indemnify the petitioner from the demand—a demand of between 2000*l.* and 3000*l.*,—which has been mentioned—and to pay him, if he would accept it, the 15*l.*,

of which mention has also been made. I consider the respondents bound, if the Court shall think it necessary to require such an undertaking from them hereafter, to give it. The accounts not having been produced, I do not think it fit at present to dismiss the petition; but I will allow it to stand over, if the directors will undertake to produce the accounts to this petitioner. Are they willing to do so?

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Mr. *Malins*.—Certainly, and they always have been.

The VICE-CHANCELLOR:—

Then let their accounts be produced to him—let him have an opportunity of bringing any matter arising upon them before the Court; but if I remain of my present opinion, there must be something strong and plainly material upon them, of an objectionable nature, to induce me to act upon this petition in the particular circumstances of the case. Let the petition stand over, with liberty to mention it again.

The petitioner has received back all but 50 guineas, and he may have 15*l.* more. It is quite clear that there must be some deduction from the 150 guineas subscribed by him; and, that being so, it is to a very small amount of contention that the dispute is reduced, if I am right in the inference that the fear of outstanding liabilities is a shadow, there being an undertaking from the respondents to indemnify against the demand connected with Mr. Rastick.

Let the accounts be inspected. Then, if either party shall think it worth while to bring the petition on again, let him do so.

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Ex parte BARNETT and Others,
In the Matter of THE IPSWICH, NORWICH, AND YARMOUTH
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AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP
ACT, 1848.

The Court made an order, directing the winding up of a joint-stock company under the Winding-up Act, 1848, upon a petition sufficient in point of form, but omitting material circumstances within the petitioner's knowledge, which ought to have been brought to the notice of the Court. This objection was taken at the first meeting before the Master. Upon a petition presented promptly afterwards, the Court discharged the order for winding up, with costs against the petitioner who had obtained the winding-up order.

The Court refused to sustain the former order at the request of an independent contributory; but discharged it without prejudice to any application that might be made to wind up the Company.

Quære, whether, where an order for winding up is discharged on account of the omission of material circumstances in the petition, contributories can recover their costs of attending before the Master against the petitioner for winding up.

THE usual order for winding up the affairs of this Company had been obtained on the 25th of May, 1849, upon the petition of Richard Green, of Framlingham, Suffolk.

The petition on which the order was made, stated that the Company had been provisionally registered under the 7 & 8 Vict. c. 110.

That the capital of the Company was 1,200,000*l.*, in 60,000 shares of 20*l.* each, with a deposit of 2*l.* per share.

That fifteen shares in the Company had been allotted to the petitioner, and that he had paid the deposit of 2*l.* per share, and that he had executed the subscribers' agreement and parliamentary contract in respect of such shares.

That divers other persons had applied for shares, which had been allotted to them; but that they had neglected to take such shares, or to pay the deposits thereon.

That application had been unsuccessfully made to Parliament for a bill to authorise the construction of the railway.

That large sums had been laid out and liabilities incurred on account of the Company.

The petition proceeded to state, that the Company had been dissolved, and had ceased to carry on business, and that the secretaries and clerks of the Company had been discharged, and the place of business of the Company had been abandoned, although the affairs of the Company had not been fully wound up.

The usual advertisement of the order was inserted in the *London Gazette*, of Tuesday, the 5th of June, 1849; and the advertisement for the appointment of an official manager of the Company was inserted in the *London Gazette*, of Friday, the 8th of June, and Tuesday, the 12th of June, 1849; and in the *Times*, of the 8th of June, 1849; and in the *Ipswich Journal*, of the 9th of June, 1849.

On Friday, the 21st of June, 1849, the solicitors to Mr. Green, in conformity with the advertisement, went in before the Master to whom the order was referred, to propose an official manager.

The present petition stated, that the advertisement in the *London Gazette*, of the 5th of June, was the first notice that the petitioners had of any proceedings under the act.

The present petitioners appeared before the Master, and objected to any further proceeding in this matter, and gave notice that they should forthwith present a petition praying that the order for winding up the Company might be discharged. The Master suspended his proceedings.

The present petition, after stating the petition of Mr. Green and the order made thereon, stated that the petitioners were members and contributors, and three of the directors of the Company; and that, immediately after the unsuccessful application to Parliament, in the session of 1846, the directors called the shareholders together for the purpose of considering whether the undertaking should be further proceeded with, or altogether abandoned; and that, at such meeting, it was resolved, that it should be abandoned; and that, after payment of the expenses incurred in promoting the undertaking, the balance of the deposit of 2*l.* per share paid upon the shares in the Company should be returned to the shareholders; and it was further resolved, that an immediate return, in respect of such deposit, to the extent of 25*s.* per share, should be paid to the

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shareholders, and that the balance thereof should be divided after the expenses should be ascertained.

That, accordingly, each of the shareholders in the Company, excepting one John Bishop, sent in their scrip to the secretary of the Company, and received the payment of 25*s.* in respect of the shares held by him or her in the Company, and at the same time received the following certificate signed by the secretary of the Company:—

“No. 777.—Ipswich, Norwich, and Yarmouth Railway Company.

“Offices, 12, Old Jewry Chambers, —, 1846.

“The holder of this certificate having delivered scrip for — shares in this Company to be cancelled, in consideration of having received thereon 1*l.* 5*s.* per share, preparatory to the dissolution of the Company, is entitled to a further pro rata division of the balance that may remain of the funds thereof, after discharging thereout all claims upon and liabilities of the Company and directors, in full discharge of all claims upon the Company and directors for this his share and interest whatsoever in the said undertaking.

“———, *Secretary.*”

That the directors shortly afterwards proceeded to discharge the debts and liabilities of the Company; and, after the same had been so discharged and paid, they caused another meeting of the shareholders to be called, viz. in the month of September, 1846, under the provisions of the 9 & 10 Vict. c. 28, and submitted to them a statement of the accounts of the undertaking, and of the balance which remained to be divided amongst them, and which balance permitted a return of the further sum of 4*s.* per share; and at such meeting it was unanimously resolved that the Company should be dissolved.

That the whole of the shareholders in the Company applied for and received the further sum of 4s. on each of their shares in the Company, excepting twenty-seven persons, holding 650 shares in the Company; and the further sum of 4s. per share, to which such 650 shareholders would be entitled in respect thereof, amounted to the sum of 130*l*.

That it was arranged by the directors of the Company, that the sum of 130*l*. should be paid over by the Company to the present petitioners, to be held by them for the persons entitled thereto in respect of the shares, and to be paid to them when demanded; so that all the affairs of the Company had been, in fact, long since wound up, closed, and determined.

The present petition also stated, that advertisements had been inserted in all the London daily newspapers, and in the several Suffolk, Norfolk, and North-of-England newspapers, on several occasions, giving notice to the shareholders that such sum of 4s. per share was payable upon the shares in the Company, and that the affairs of the Company would be closed on the 24th of December, 1846; on which day the offices of the Company were given up.

The present petition also stated, that the petitioners held the sum of 130*l*., which they were ready to divide among the persons entitled thereto, and that all the debts and liabilities of the Company had been paid and discharged.

The facts above stated as being set forth in the present petition, were verified by affidavit, and none of them had been suggested to the Court in the petition of Mr. Green.

It further appeared, that Mr. Green had made an affidavit in support of his petition before Mr. Edwards, a solicitor, of Framlingham; and that the only contributory on whom notice of the intended application to this Court by Mr. Green had been served was the brother of Mr. Ed-

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wards; that Mr. Green must have known who were the directors of the Company; and that he must also have known the above circumstances, not disclosed in his petition, and must have received the return of the two sums of 1*l.* 5*s.* and 4*s.* on his shares.

After the present petition had been filed, application was made to the present petitioners for an inspection of the books and accounts, but which was refused by them.

Mr. K. S. Parker and Mr. Hetherington for the petitioners

Mr. Malins and *Mr. Roaburgh*, for Mr. Green.—Mr. Green's petition contained all necessary statements entitling him to the order to wind up this Company, and all other proceedings required by the act have been taken; and it would be difficult to limit the extent of statements affecting such companies as these in a petition, if the petition entered into details of circumstances beyond those which were necessary to be stated to bring the case within the operation of the act.

It is manifest that large funds have been received by these directors, the account of which does not appear to have been rendered or audited, or submitted to any proper investigation; and, although the present petitioners ask to have the order for winding up discharged, they refuse to afford Mr. Green an inspection of the books.

The present application is in the nature of a re-hearing of the former order; and, by the Winding-up Act, 1848, it is enacted, "that every order made by the Master of the Rolls, in England or Ireland, or any of the Vice-Chancellors in England, under this act, may be re-heard before the Lord Chancellor of Great Britain or Ireland, as the case may be; and such re-hearing may be brought before the Lord Chancellor by way of motion"^(a). It is submitted,

(a) Sect. 101.

therefore, that the present application should be by motion, and not by petition, and should be made before the Lord Chancellor, and not before this branch of the Court.

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Mr. *Morris*, for a contributory, supported the existing order. He referred to the 9th section (a) of the act, and asked, in case the Court should decide that the order could not be sustained by Mr. Green, that his client might be allowed to carry on and prosecute the proceedings under the present order.

The VICE-CHANCELLOR:—

Under the particular circumstances of this case, it is to be remarked, that there were persons, including some of the present petitioners, on whom Mr. Green's petition might have been properly served, but on whom it was not served; without, however, entering on the observations which this remark might suggest, it is enough to say, that Mr. Green's petition omitted to state material circumstances within his knowledge, which ought to have been brought to the notice of the Court.

The only question is, was the objection taken in sufficient time? It was taken at the first meeting before the Master; and I am of opinion that that was sufficient. I dis-

(a) By which it is enacted, praying to have the benefit of the former proceedings, and to be allowed to carry on and prosecute the same; and, upon such petition being presented and coming on to be heard, such order shall be made as to the Court shall seem necessary and proper, empowering and directing that the former proceedings shall be carried on and prosecuted by the petitioner.

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charge the former order, with the costs of this application, to be paid by Mr. Green.

This order to be without prejudice to any other petition.

Mr. *Daniel*, for a contributory who had appeared by counsel before the Master, asked for the contributory's costs of so appearing, against Mr. Green.

His HONOR said, he could not give such costs upon the present motion; but he would hear such an application, if made upon proper notice.

June 20th & In the Matter of THE VALE OF NEATH AND SOUTH WALES
 July 20th. BREWERY COMPANY.

MORGAN'S CASE.

The directors of an unincorporated Joint-stock Company called an extraordinary general meeting, by a notice stating its purpose to be to receive from the directors a proposition for paying off advances made

THIS was a motion, on behalf of Mr. Israel Morgan, to vary the decision of the Master who had inserted Mr. Morgan's name on the list of "contributories" to the above Company, without qualification.

The Company was formed upon the terms of a deed of settlement, of which the following were the material articles:—

"1. That a Joint-stock Company shall be, and the same

to the Company, and discharging such other liabilities as required to be paid at an early period, without appropriating to that purpose the funds accruing from the present trade. At the meeting, resolutions were passed for raising sums by loan notes; and one of the resolutions provided, that, if any shareholder should be desirous of retiring, the directors should be at liberty to purchase his shares at a price not exceeding 15*l.* per share, on his investing an amount not less than the purchase-money for his shares, and taking the loan note of the Company, payable in five years, with interest for both the price of his shares and the loan. Copies of these resolutions were forwarded to all the shareholders, and some of them transferred their shares upon the terms proposed, making the stipulated advances, and taking loan notes. The powers of the directors under the deed of settlement did not enable them to enter into this arrangement:—*Held*, that such a transfer made by a shareholder in 1844, and remaining unquestioned till 1849, when the Company was wound up under the Winding-up Act, 1848, was not, on the ground of acquiescence on the part of the Company or otherwise, sufficient to restrict his liability as a contributory to the period when he parted with his shares, whatever might be the equities between him and individual shareholders.

is hereby formed, for carrying on the said Brewery, to be intitled 'The Vale of Neath and South Wales Brewery Company,' with a capital of 125,000*l.*, in 6250 shares of 20*l.* each; and that the several persons parties to these presents, and the several other persons who shall become proprietors as hereinafter mentioned, shall, while holding shares in the capital of the said Company, be and continue partners in the said Company, until the same shall be dissolved under the provisions hereinafter contained; and the said shares shall be numbered from 1 to 6250 in the register book of shares.

"19. With regard to any share or shares in the capital, which 'shall or may be forfeited to the Company, or purchased by the directors, under the provisions for that purpose hereinafter contained, it shall be lawful for the directors for the time being to sell the same to any person or persons in severalty, who shall be approved of by them as fit to become a proprietor or proprietors in respect thereof, for such price or prices, and upon such terms, as they shall think reasonable; and, as to such forfeited or purchased shares, either with or without the dividends which may have been declared in respect thereof.

"22. The directors shall at all times have or keep in the hands of the bankers of the Company, such a balance as shall be sufficient to answer the current expenses and demands of the Company; and when and so often as the balance in the hands of the bankers shall be more than sufficient for the ordinary purposes of the Company, or for paying the yearly dividends to the proprietors, the directors shall, so far as they conveniently can, accumulate the same until a surplus fund be raised or provided amounting to the sum of 10,000*l.* sterling money, and shall report the amount of such accumulation at every annual general meeting; and, for making the aforesaid accumulations, the directors shall lay out and invest the monies or funds appropriated to such purposes in the names of the

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trustees for the time being of the Company, in any of the public stocks or funds of Great Britain, or at interest upon Government or real securities in England or Wales, but not in Ireland; or in paying off and discharging the said mortgage-money or sum of 15,000*l.*, or any part thereof; and shall, from time to time, alter, vary, and transpose the said stocks, funds, or securities, as occasion may require, or as it shall be deemed expedient; and, in case a sufficient balance at the bankers cannot be obtained by other means, or for the purposes to which such surplus fund is by these presents made applicable, the said trustees or trustee for the time being, on being thereunto required by the directors, shall sell and convert into money a competent part of the surplus fund, and of the stocks, funds, or securities in which the same shall, for the time being, be invested.

“23. The directors may from time to time, by and out of the surplus fund hereinbefore mentioned, purchase and buy up any share or shares in the capital stock of the Company which shall be offered for sale; and shall, at their discretion, either sell as they may think proper, or shall suffer the same to sink into the general stock or funds of the Company, for the benefit of the existing shareholders, according to their several and respective shares therein.

“37. It shall be lawful for the present or future proprietors, and all persons claiming under them or in their right, whether by marriage, or as executors, legatees, guardians, committees, or assignees upon bankruptcy, insolvency, or otherwise, to assign or transfer the respective shares of such proprietors respectively in the capital and property of the Company to any person or persons in severalty, subject, nevertheless, to the approbation of the directors for the time being; but no assignment or transfer, without the approbation of the directors, to be manifested as hereinafter mentioned, shall have any force either at law or in equity.

“41. Upon all transfers of shares to purchasers and others,

approved of by the directors, and in all cases of husbands, executors, administrators, or legatees, applying to become proprietors of shares belonging to, or claimed by them in those characters, and being approved of by the directors, such alterations shall be made in the share register book, and also in the copies, by way of certificate of former entries therein respecting the same shares, as the circumstances may require. And the approbation of the directors in all the above cases, to be valid, shall be manifested by entries or memorandums to that effect in the share register book, under the signatures of two of the directors for the time being, and by like memorandums, so signed, added to or indorsed upon the copies or certificates of the former entries respecting the shares in question in the share register book; or, instead of such last-mentioned memorandums, by such copies or certificates being delivered to the parties entitled thereto, of the new or altered entries respecting the same shares in the share register book.

"50. If at any time it shall appear to any three of the directors, or to six or more proprietors, being owners of not less than 100 shares in the whole, that an extraordinary meeting should be held of the proprietors at large, to take into consideration any matter or matters affecting the Company, the secretary or the chairman of the directors for the time being, at the requisition of such three directors, or six or more proprietors as aforesaid, expressing the object for which the meeting is required to be held, shall convene an extraordinary general meeting of the proprietors of the Company, by letters delivered or sent through the General Post to the several proprietors, seven days at least before the time to be appointed for holding such meeting, in which letters shall be expressed the day, hour, and place for holding the same, and likewise the specific object or objects of the meeting. Any extraordinary general meeting specially called for the purpose, shall have full power

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to increase the capital of the Company, either by creation of new shares, or otherwise, as may be considered advisable; as also to make new laws, regulations, and provisions for the government of the Company, and carrying on the affairs or business thereof; or to amend, alter, or repeal, either wholly or in part, all or any of the existing laws, regulations, and provisions of the Company; or to resolve on the dissolution of the Company, and to fix a day for such dissolution.

“58. But at no extraordinary general meeting shall any such determination as above mentioned be made, unless seven days' previous notice, by letter delivered or sent as aforesaid, shall have been given to the several proprietors of the Company, of every proposed increase of the capital, new regulation, or provision, and of every proposed amendment, alteration, or repeal of any existing law, regulation, or provision, or of the proposed dissolution of the Company.”

The facts, as they appeared from Mr. Israel Morgan's affidavit, were as follow:—

Upon, or shortly after the establishment of the Company, Mr. Morgan agreed to take five shares therein, numbered 3086, 3087, 3088, 3089, and 3090, and dated respectively the 13th of April, 1840; and in 1842 another share in the Company, (as Mr. Morgan understood,) one of the newly created shares, numbered 6, and dated the 5th of March, 1842, was, without Mr. Morgan's knowledge, allotted to him by the directors. He paid to the Company the full amounts payable by him in respect of all six shares, some time before the month of March, 1844; but, as he was informed and believed his name was never inserted in the share register of the Company, as the proprietor of the six shares, or any of them, Mr. Morgan never signed or otherwise executed the deed of settlement of the Company, but was ignorant of its contents. On April 10, 1844,

an extraordinary general meeting of the shareholders of the Company was convened by, or by the orders of the directors, by the following circular letter or notice, written and sent by their secretary to the respective shareholders:—

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"Vale of Neath Brewery, Neath, March 30, 1844.

"Sir,—I am instructed by the directors to give you notice, that an extraordinary general meeting of the proprietors of the Vale of Neath and South Wales Brewery Company will be held at No. 59, Queen-square, Bristol, on Wednesday, the 10th day of April next, at twelve o'clock precisely, for the purpose of receiving from the directors a proposition for paying off the advances made during the recent interruption of the trade, and discharge such other liabilities as required to be paid at an early period, and to provide for such payments without appropriating to that purpose the funds accruing from the present trade.

"I remain yours faithfully,

"WM. LOWTHER, *Secretary.*"

Mr. Morgan received one of these circulars, but did not personally, or by proxy, attend the meeting.

Shortly after the meeting, Mr. Morgan received from the secretary of the Company the following statement of the proceedings, which were had at the meeting. The statement was printed, and a copy was sent to every shareholder in the Company, by order of the directors:—

"At an extraordinary general meeting of the proprietors of the Vale of Neath and South Wales Brewery, held at No. 59, Queen-square, Bristol, on Wednesday, the 10th day of April, 1844, Mr. Busher in the chair, the following resolutions were passed unanimously:—

"Moved by Mr. Buckland, seconded by Mr. Stohert—

"That the sum of 10,000*l.* be introduced, such sum to

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be applied in paying off advances made during the recent interruption to the trade, in discharging liabilities which existed previously to the recommencement of the trade under the new manager, and in refunding the monies which have been withdrawn from the new trade for either of those purposes.

“Moved by Mr. Spender, seconded by Mr. Stancomb—

“That such sum be introduced by way of loan, at 5½ per cent. interest, on the loan notes of the Company, for such periods as may be agreed upon by the lenders, so that no advance be for a shorter period than one year; and that six months' notice be given if the lender does not intend to renew the note when at maturity.

“Moved by Mr. Wood, seconded by Mr. Spender—

“That one moiety of such sum be so provided by the directors; and that the other half be so provided by the rest of the shareholders, in proportion to the number of shares held by each.

“Moved by Mr. J. W. Little, seconded by Mr. T. Little—

“That any shareholder procuring the introduction, either by some other shareholder, or by a party not a shareholder, of an amount equal to his own proportion of such advance, shall be considered to have complied with those resolutions.

“Moved by Mr. Keene, seconded by Mr. Dunn—

“That any shareholder advancing, or procuring to be advanced, an amount exceeding his own proportion, may, if he thinks fit, allow the excess to go in exemption, to that extent, of any other shareholder or shareholders whom he may name in that behalf.

“ Moved by Mr. Brown, seconded by Mr. Lawes—

“ That all such advances be made within three months from the present day.

“ Moved by Mr. T. Little, seconded by Mr. Hitcock—

“ That no shareholder, now holding less than five shares, shall be obliged to contribute any portion of such advance.

“ Moved by Mr. Derry, seconded by Mr. Sergeant—

“ That, if any shareholder shall be desirous of withdrawing from the Company, the directors shall be at liberty to purchase his shares at a price not exceeding 15*l*. per share, on his investing, or procuring to be invested, an amount not less than the purchase-money for his shares, and taking the loan note of the Company for five years at 5*l*. per cent. interest for such instalment, together with the purchase-money for his shares; but in case of preference, shares being so purchased by the Company, the same shall be taken at a price not exceeding 20*l*. per share, and not less than a corresponding amount be introduced.”

On receipt of this printed statement, Mr. Morgan sent to the secretary 30*l*. for a loan to that amount, which Mr. Morgan determined to make to the Company, pursuant to the resolutions, and he thereupon received from Mr. Lowther, the secretary, the following letter:—

“ *3rd June, 1844, Vale of Neath Brewery, Neath.*

“ Dear Sir,—I have the pleasure of acknowledging the receipt of your favour, covering first half of cash notes, 30*l*. In answer to your question, as to security for the above, and also as to our prospects, I have to inform you, that, of course, the whole body of shareholders are bound

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to pay these loans, should not the trade enable us to liquidate them. With respect to the latter part of your inquiry, I beg to say, I have every reason to hope that the new system of doing business, and our new article, will place us in a better position still. Were I a shareholder, holding not more than yourself, I should certainly avail myself of the offer of the Company to buy up shares, as the principal money would then be safe from further loss, the interest at 5*l.* per cent. per annum, paid half-yearly, and yourself secured from all present and future liabilities. As it is only by letter I can communicate with you, I send, hereunder, particulars of the transactions, if you adopt the course—a prudent one. You will consider the suggestion, of course, as made in confidence, as it is not my business to press shareholders to take one course or the other. I shall be glad to receive a reply at your early convenience, as I will keep your loan note open, and shall be happy if I can be of any service to you at any time.

“ I am, dear Sir,

“ Yours, very faithfully,

“ WM. LOWTHER.

“ Particulars referred to in the foregoing:—

You hold six shares of the Company—purchased these at 15 <i>l.</i> : it would amount to	£	s.	d.
The amount to be introduced, say equal only to purchase-money	-	90	0 0
You would then have a note, payable in June, 1849, bearing interest at 5 <i>l.</i> per cent. per annum, payable half-yearly, for	-	180	0 0
		<u>£180</u>	<u>0 0</u>

“ Vide last resolution of meeting, April 10, 1844. Of this amount the 30*l.* now paid, would, I dare say, go in

part, in which case it would only require 60*l*. more at the outside. I am sure I could manage it for 80*l*. in addition to the 30*l*.; in which case you would have a note for 200*l*."

In reply to this letter, Mr. Morgan wrote a letter, dated 7th June, 1844, containing the following passages:—

"If I understand you right, by my paying you 60*l*., in addition to the 30*l*. already paid, I become a creditor of the Company for 180*l*., and by that means cease for ever to be one of the Company, from the moment the amount is transferred as a loan to the Company, for five years, at 5*l*. per cent. per annum. Now, in so doing, I sacrifice 30*l*., and lose all claim to profits or emoluments as a shareholder, and am, of course, exempted from all claims and liabilities that may now or hereafter be made on the Vale of Neath Brewery Company. If I understand you right, that is the condition on which the offer is made; and, no doubt, the Company will give an indemnity to that effect. I leave the matter in your hands to put me in on best terms.

"I should likewise be glad to know whether the money can be paid up in a shorter time than five years, if necessity required it, or is five years the stated time to pay it up?"

Mr. Morgan received from the secretary the following reply, dated the 11th of June, 1844:—

"Vale of Neath Brewery, Neath.

"Dear Sir,—I beg to inform you, that, on receipt of your favour of the 7th instant, I offered your shares to the directors, on behalf of the Company, at 15*l*., which offer has been accepted on the terms of the resolutions passed at the meeting held on the 10th ult.; and, to facilitate the matter, I

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inclose your transfer to Mr. Buckland (who in it represents the Company), which you will please execute in the presence of a witness, who will write his name, address, and description where I have put 'A. B. of &c.' On your attending to this, and returning the same to me, with the certificates of shares, and the 60*l.*, I will duly register the transfer, and send your certificate of registration, when, by the deed of settlement, you are secured against all past and future liabilities. I should have been glad to have obtained you better terms, had it been in the power of the directors. The only indulgence I can procure for you is, that, if it is not convenient to send the cash, you may send your promissory note (form inclosed) at two months, which shall be taken without charge. Hoping to hear from you that my arrangement is satisfactory to you, as I assure you it is what I should have recommended to any friend,

"I remain, dear Sir, yours faithfully,

"WM. LOWTHER."

There was inclosed in this letter an indenture, expressed to be made between Mr. Morgan of the first part, and William Henry Buckland (therein described as of Cadoxton-place, in the county Glamorgan) of the second part, and John White Little and William Brunton, therein described as two of the trustees of the Brewery Company, of the third part, whereby, in consideration of 90*l.*, therein stated to have been paid to Mr. Morgan by Mr. Buckland, Mr. Morgan bargained, sold, assigned, and transferred unto Mr. Buckland, his executors, administrators, and assigns, the six shares, numbered as thereinbefore mentioned, of and in the undertaking called the Vale of Neath and South Wales Brewery Company, to hold the same unto and to the use of Mr. Buckland, his executors, administrators, and assigns, subject to the rules, regulations, provisions, covenants, conditions, and agreements mentioned in the deed

of settlement of the Company, bearing date the 3rd day of March, 1840; and Mr. Buckland thereby for himself, his heirs, executors, and administrators, purported to covenant and agree to and with Mr. Morgan, and also separately with the trustees, that Mr. Buckland, his executors and administrators, should and would in all respects, whilst he should continue to hold or have any shares in the Company, well and truly observe, perform, fulfil, and keep all the covenants, articles, stipulations, and agreements which ought to be observed, performed, fulfilled, and kept by him, his heirs, executors, and administrators respectively, in respect thereof or in relation to such shares, so for the time being remaining in his name in the books of the Company, according to the true intent and meaning of the same covenants, articles, stipulations, and agreements respectively.

Mr. Morgan executed the deed, and sent it to the Company, with his certificate of the six shares, and also his promissory note, dated the 13th June, 1844, for 60*l.*, payable to the Company two months after date, and which was duly paid.

Mr. Buckland, who was one of the directors of the Company, executed the deed of transfer after it had been executed and returned by Mr. Morgan. The 90*l.* in the deed of transfer, mentioned to have been paid to Mr. Morgan by Mr. Buckland, was not paid, but was part of the 180*l.* secured by the loan note, which Mr. Morgan, shortly after returning the deed of transfer, received from the Company as the consideration for his advance of 90*l.*, and for the purchase-money for the six shares.

The interest on the loan note for 180*l.* was paid to Mr. Morgan by the Company down to the 22nd December, 1846, but the principal, with the interest thereon from that date, remained due. In a book of the Company, called the "Shareholders' Ledger," was the following entry

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under his name, relating to the sale:—"1844, June 15th—
 Transferred, W. H. B."

After the time of the transfer, Mr. Morgan never acted as a shareholder of the Company, nor as in any way connected therewith, except as a creditor in respect of the loan note.

The Master gave the following judgment on settling the list, with the insertion of Mr. Morgan's name as a contributory without qualification:—

This Company was established under a deed of settlement, dated the 31d March, 1840, by which certain persons named therein, and several others who signed the deed, agreed to form themselves into a joint-stock company for carrying on the business of a brewery, with a capital of 125,000*l.*, in 6250 shares of 20*l.* each. Five gentlemen were by the deed named as directors, by whom it was provided, that all the affairs of the Company should be managed, and all purchases and sales connected with the business made, subject to certain provisions therein contained, and to the rules to be made from time to time at general meetings. The directors were to keep books of account, and to render at the annual general meetings an account of receipts and expenditure, and a report of the general affairs of the Company. They were also directed, by clause 22, to keep sufficient balances in the hands of the bankers of the Company, and, when such balances exceeded the ordinary demands, the same were to be accumulated by investment in Government or real securities in Great Britain until a surplus fund of 10,000*l.* had been created; and if at any time the balance at the bankers' was deficient, it was to be supplied by sale of a sufficient part of the surplus fund. A power was then, by clause 23, given to the directors to purchase, out of this surplus fund, any shares of the Company that might be offered for sale.

such shares to be either re-sold, if the directors thought fit, or suffered to sink into the general stock of the Company. A power was also given, by clause 19, to the directors to sell, to such persons as they might approve, any shares that should have become forfeited. It was also provided, by clause 42, that if the representatives of a deceased proprietor, or the husband of a female proprietor, should not obtain the approbation of the directors to be admitted a proprietor, or should be unable within six months to sell his share to a person to be approved of by the directors, then the directors were compelled to purchase such shares at the market price, and such shares were to be held in trust for the benefit of the Company. After a careful consideration of this deed, and the constitution of this Company, it appears to me that the intention of the partners was to raise a sufficient capital to carry on the business of a brewery, and to place the management of this capital in the hands of five directors, who were to act as they should think fit in conducting the affairs of the concern, to make such purchases and to incur such expenses as were necessary and proper for conducting the business, (clause 11,) and who also, under certain restrictions, and out of certain funds only, were to be at liberty to purchase shares. It has been contended before me, that, inasmuch as the deed contains no words directly prohibiting the purchase of shares, the directors might use the powers which the members of any partnership possess of buying out a partner; and the case of *Taylor v. Hughes*(a), has been relied upon in support of that position. After a full consideration of that case, I do not think it can be made to apply to this brewery. In that case the deed of settlement neither authorised nor forbade the purchase of shares by the directors; and the only ar-

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The guide for determining its powers and
power is given to three directors or
less than 100 shares, to call an
requisition, expressing the object
is to be convened by cir-
proprietors seven days be-
object or objects of
r, duly convened,
capital of the
otherwise; also to
of the Company, and
end or alter any existing
company. But by clause 58, no
unless seven days' previous notice
provided by clause 50,) and unless the
at to each proprietor shall state every pro-
crease of capital, new regulation or provision,
y proposed amendment, alteration, or repeal of any
law, or the proposed dissolution of the Company. It is
further provided (by clause 56) that minutes of every
general meeting shall be entered in a book, and the mi-
nutes so entered shall be signed by the chairman or by two
proprietors present, and the minutes so signed shall be
conclusive evidence that the proceedings were regular, and
shall be binding upon the proprietors. On the 27th of
March, 1844, a requisition, duly signed as required by the
deed, was addressed to the secretary, requiring him to call
a meeting on the 10th of April, 1844, "for the purpose of
receiving from the directors a proposition for paying off the
advances made during the recent interruption to the trade,
and discharging such other liabilities as require to be paid
at an early period, and to provide for such payments with-
out appropriating to that purpose the funds accruing from
the present trade." On the 30th of March the secretary ad-
dressed a circular to each proprietor, stating the purpose of

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gument that could be raised even on the context of the deed, in favour of the prohibition to purchase, was the clause which limited the number of shares to be held by any individual. It may safely, then, be assumed, that the deed was silent upon the subject, and the decision of the Lord Chancellor *Sugden* was, therefore, founded on other and perfectly sufficient grounds. But in this brewery case the deed appears to me to point out the only modes by which the directors are empowered to purchase shares; and it is perfectly consistent with the nature, intention, and well-being of the Company, as brewers, that this power should be so restricted. If, therefore, I find the directors buying shares in any other manner than that prescribed by the deed, I must hold such purchases to be invalid, and the transaction as between the partners not to be binding. Whatever partner, then, has sold or transferred his shares to the directors, either actually or virtually, must be placed upon the list of contributories as if no such sale or transfer had taken place. But it has been contended, that, even if the directors had no power under the deed to purchase shares, except in the manner therein expressed, yet that the shareholders, at a general meeting, might confer such power on the directors; and that, in fact, at an extraordinary general meeting, held on the 10th of April, 1844, such a power was, with certain restrictions, given to and exercised by the directors, and that all purchases of shares by them, in pursuance of the resolution passed at that meeting, are binding, and the shareholders who sold them are discharged from all future liability or concern in the partnership. As this involves questions of great amount, it is necessary to look narrowly into the provisions of the deed in this respect, because I hold it to be perfectly clear, that, in the case of a joint-stock company, the very circumstances of its form and constitution make it so far different from a common partnership, that its deed of settle-

ment is almost the sole guide for determining its powers and liabilities. By clause 50 power is given to three directors or six proprietors, holding not less than 100 shares, to call an extraordinary meeting by requisition, expressing the object of the meeting, and such meeting is to be convened by circular letters, to be issued to the proprietors seven days before the time, and stating the specific object or objects of the meeting. Any extraordinary meeting, duly convened, has power (by clause 57) to increase the capital of the Company by creating new shares or otherwise; also to make new laws for the government of the Company, and to carry on its affairs, or to amend or alter any existing laws, or to dissolve the Company. But by clause 58, no such matter shall be done unless seven days' previous notice has been given, (as provided by clause 50,) and unless the letter to be sent to each proprietor shall state every proposed increase of capital, new regulation or provision, every proposed amendment, alteration, or repeal of any law, or the proposed dissolution of the Company. It is further provided (by clause 56) that minutes of every general meeting shall be entered in a book, and the minutes so entered shall be signed by the chairman or by two proprietors present, and the minutes so signed shall be conclusive evidence that the proceedings were regular, and shall be binding upon the proprietors. On the 27th of March, 1844, a requisition, duly signed as required by the deed, was addressed to the secretary, requiring him to call a meeting on the 10th of April, 1844, "for the purpose of receiving from the directors a proposition for paying off the advances made during the recent interruption to the trade, and discharging such other liabilities as require to be paid at an early period, and to provide for such payments without appropriating to that purpose the funds accruing from the present trade." On the 30th of March the secretary addressed a circular to each proprietor, stating the purpose of

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the meeting in the exact words above stated of the requisition. On the 10th of April the meeting was held, and was attended by eighteen proprietors, (including four directors,) and certain resolutions were agreed upon. The first of these, namely, that 10,000*l.* be introduced and applied to the purpose of paying off advances and discharging liabilities, &c., is in strict accordance with the requisition and the circular. The second, that such sum be introduced by way of loan, at 5*l.* per cent. on the loan notes of the Company, for such periods as may be agreed on by the lenders, is likewise in conformity with the requisition and the circular. The third, that a moiety of such sum be provided by the directors, and the other moiety by the shareholders; and the four following resolutions, applying to the same subject, are likewise within the requisition and circular. Then comes an eighth resolution—"That if any shareholder be desirous of withdrawing from the Company, the directors shall be at liberty to purchase his shares at 15*l.* per share, on the shareholder investing an amount not less than the purchase-money for his shares, and taking the loan note of the Company for five years, at 5*l.* per cent. for the whole;" with an exception in the case of preference shares, which are to be bought at 20*l.* per share, with a corresponding amount of loan from the vendor. Now, I cannot find, either in the requisition or in the circular, any words, direct or inferential, that could have given the proprietors notice that any such resolution was to be submitted to the meeting. Assuming that any general meeting had power to authorise directors to purchase shares *ad libitum*, (which I very greatly doubt,) nothing can be more certain than that the 50th clause required this to be stated as the specific object, or one of the specific objects, of the meeting. It might have been a very laudable and useful object, and certainly might without difficulty have been stated in the cir-

cular. The inducement held out to the shareholder to lend to the Company was to relieve him of his shares, and with them of his liabilities. By such an arrangement the Company got the benefit of his shares at a reduction of 25*l.* per cent. below their original value, got an advance of an equal sum of money in hard cash, and obtained no less accommodation than five years' time to pay off the debt. In the then condition of the Company's affairs this might have been for them a very advantageous bargain, and might easily have been stated in the requisition and circular in such terms as to be perfectly intelligible to the proprietors. I find, however, no such statement; and, therefore, I cannot say that, in my opinion, the terms of the deed have been complied with. It may also be observed, that the minutes of that meeting do not appear to have been signed by the chairman—at least, no such minutes have been found. I do not lay much stress upon this, because, being a document that ought to be in the possession of the official manager, its non-production ought not to be conclusive against the parties who contend that this meeting was in all respects regular. It cannot, however, be contended, that, under clause 57, the minutes in this case "are conclusive evidence that the proceedings were regular, and binding upon the proprietors." I have hitherto considered this resolution on the interpretation to be put upon the clauses of the deed as regards the regularity of the general meeting which passed it; and upon this part of the case alone there is quite enough to bring me to the conclusion that the resolution, and all that was done under it, is invalid. But further, I do not think any general meeting, ordinary or extraordinary, had power to enable the directors to purchase without limit the shares of the proprietors. The powers to be given to them by such meeting are sufficiently defined by clause 57. They might increase to any amount the capital of the Company, either by creating new shares, or by any other means they

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might think advisable; they might make, alter, or repeal laws and regulations for carrying on the business of the brewery; they might altogether dissolve the Company; but no powers could be conferred on them by any general meeting to swamp the Company by extinguishing any portion of the shares, and to that extent relieving the holders from all future liabilities, while to the same extent they increased the liabilities of all the remaining shareholders. The power of buying shares was expressly limited by the deed, and could not exceed the assumed surplus capital of 10,000*l*. If that capital never had an existence, the directors had no funds which they could properly apply to the purchase of the shares, with the exception stated in the deed, and expressly provided for—such, for instance, as a purchase from a husband of a female proprietor. But the deed gives no general power to purchase shares; and, looking at it in all its bearings, I do not think it provides any means whatever by which the directors could be empowered to purchase, except in the manner I have already pointed out. Some argument was urged, on the ground that the proprietors had acquiesced in these purchases, and could not now impeach them, particularly as the Company had had the benefit of the shareholder's money, and had made no offer to pay him back, so as to place him where he was before the sale and transfer. In the case of a joint-stock company composed of innumerable partners, wherein the deed of settlement is clear and intelligible, I feel bound to follow it. It is the only security the proprietors have. Unlike small partnerships, where each member is as much a manager and conductor of the business as his co-partners, the members of a joint-stock company entrust all the conduct of the concern to their directors, who are bound to manage according to the precise provisions of the deed. If they depart from them, any proprietor has a right to object, and, claiming the protection of his deed, to treat the irregular act as a nullity. So far as any of the

sales under the resolution of April, 1844, have been bonâ fide on the part of the vendors, their case may be perhaps one of hardship, as they must now contribute to the liabilities, and can only come in to prove on their loan notes; but they must be taken to have known the provisions of their own deed, and ought not to have sold their shares to parties who were not qualified to purchase them. Indeed, it has been stated to me, that not more than twelve or fourteen proprietors sold under the resolution of April, 1844; from which I conclude that the great bulk of the shareholders looked upon the resolution as a nullity, and preferred keeping their shares and remaining proprietors, although the Company, by the very terms of the requisition, was by no means in a prosperous state. For the reasons, then, that I have here stated, I shall place upon the list of contributories, without qualification, all persons who have sold their shares to the directors of the Company, unless such sales have been authorised by the provisions of the deed of settlement.

Mr. Bacon, Mr. G. L. Russell, and Mr. Toller, for the motion.—It is not necessary to discuss whether the rules contained in the deed of settlement authorised the purchase or not, because the shareholders at the meeting clearly sanctioned it. Sufficient notice was given of the purpose for which that meeting was called, and any shareholder might have attended it. The resolutions were afterwards forwarded to all the shareholders, and no objection was ever made to them. On the contrary, they were acted upon in several instances; and, after profiting by the proceedings of the directors, the other shareholders cannot, after five years' acquiescence, disavow the transaction. The transfer is recorded in the Company's ledger, to which all members had access, and which is binding as between the shareholders themselves. *Taylor*

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v. Hughes (a) is expressly in point. In that case, Sir *E. Sugden* says:—"In support of the first objection, it was said that a purchase by the Company was contrary to the 6 Geo. 4, c. 42, ss. 2 and 22, for all the individuals composing the copartnership were made liable by section 22, and they could only discharge themselves of the liability by a transfer to another, under section 22; and the assignee under that section must be a *bonâ fide* holder, and not a trustee for the Company. I think that the act of Parliament did not prevent or interfere with the *bonâ fide* retirement from the copartnership of any member; and, therefore, that the Company might buy out a partner notwithstanding this act. It was said, that such a purchase also struck at the deed of settlement of 1836. It was admitted that it was not expressly forbidden; but the context of the deed was resorted to in order to make out a case of exclusion; and the prohibition in clause 10, against any individual holding more than a limited number of shares, was relied upon. After an attentive consideration of the deeds, I do not think that they prohibit the Company from buying out a partner; and the mode in which they thought fit to execute this purchase is, I think, unimportant. The prohibition in clause 10 cannot apply to the Company; and other clauses which are referred to show that the Company might become possessed of a much larger number of shares. The power in the 87th clause, to the directors or consulting committee to act in cases unprovided for, in such manner as they should think best calculated to promote the welfare of the Company, would, I think, fully warrant the acts which they have done. Great numbers of shares were thus purchased; and the Company are not at liberty now to say that the directors were not authorised to make the purchase. They cannot claim a privilege higher than any

(a) 2 Jones & Lat. 24.

other copartnership. Lord *Eldon*, in *Const v. Harris* (a), to which I before referred, said, that articles which had been agreed on to regulate a partnership could not be altered without the consent of all the partners; but that, if alterations were made by some of the partners, and acquiesced in by all, the Court would hold that to be an adoption of new terms. This, I may observe, is a rule always acted upon. Now, in this case, purchases were openly made and regularly entered in the books; the stock accounts explain the transactions; and the purchases were adopted by the Company at large, after full notice. The reports which have been put in evidence expressly refer to the extensive purchases of shares by the Company; and, in 1837, a general meeting gave a direct authority to purchase, without complaining of previous purchases."

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Mr. *J. Russell*, Mr. *James Parker*, and Mr. *T. H. Terrell* for the official manager.—It is clear, that, independently of the meeting, the directors had no power to buy the shares, because the surplus fund, out of which such purchases could have been made according to the articles, did not exist. Then, did the general meeting confer any such power? In the first place, it is very doubtful whether any meeting could, without the consent of every shareholder individually, so alter the constitution of the Company as to enable the directors to buy up shares, especially when the

(a) 1 Term R. 517. See also *Geddes v. Wallace*, 2 Bligh, 270, which appears to have been the case of a Company in which there were at least eighty shares. Lord *Eldon* there said, "It appears to me, notwithstanding all the difficulties which belong to certain transactions, which are stated to have taken place while the part-

nership existed, between 1786 and 1792, that the transactions after 1792 are such in their nature, that, consistently with the safety and interests of mankind, it is impossible to permit these copartners, after those transactions, in my judgment, to say that *Geddes* was a partner with them for loss."

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Company was in embarrassed circumstances. In the next place, if it could, a definite and accurate notice of an intention so to do should have been given; whereas the only notice issued was of the most vague description. The power of general meetings is defined by the 50th and 58th articles of the deed of settlement. The only remaining ground on which the appellant relies, is that of acquiescence; but the mere passing of an illegal set of resolutions at a general meeting, could not render it incumbent on every individual shareholder to come forward and take means to have the resolutions rescinded. Those who chose to act on those resolutions may be bound by them, but they cannot affect the general body of shareholders. That body cannot have imposed upon them burdens which they never contracted or undertook to bear. They contracted to be shareholders in a Company, in which there were to be 6280 shares. If the concern prospered, the rule in the deed of settlement, authorising the purchase of shares by the Company, might be beneficially put into operation, because the actual capital would remain; but, in a contrary state of circumstances, if the directors could take upon themselves to extinguish as many of the shares as they might think fit, they would be able to change the liability of any individual shareholder from that of bearing $\frac{1}{6280}$ th part of the Company's losses, to that of bearing one-fourth of the amount. It could not be competent for them so to change the contract between the Company and any shareholder, without such shareholder's concurrence; and Mr. Morgan must have known that the directors could have no such power. *Taylor v. Hughes* does not establish that it is incident to the powers of directors of joint-stock companies generally to buy up shares. The Company in that case was a joint-stock bank, and was regulated by the provisions of the acts applicable to banking companies, which do not apply to the present.

Mr. Bacon in reply.

The VICE-CHANCELLOR:—

Mr. Morgan's counsel have very properly not entered into the question, whether he is liable or not liable to all or any of the unsatisfied creditors of the Company who became creditors after June 18, 1844. He may or may not be so liable. I give no opinion as to the point.

But there are also many questions relevant to the present discussion, which have been raised in the arguments, on which it does not appear to me necessary to give an opinion, there being one view of the case, that, in my mind, renders it immaterial to enter upon any other.

I am of opinion, that it is a just inference in point of law, as well as of fact, from all the particular circumstances of the case taken together, that every individual shareholder, present or not present at the meeting of the 10th of April, represented or not represented at that meeting, was informed of the resolutions then passed, and did, being so informed, acquiesce in them, whether they were well or not well passed.

I must, therefore, hold, that every individual shareholder is bound by the transaction between the appellant and Mr. Buckland, which transaction was a part of the arrangements then resolved upon,—arrangements that, I agree, depended, very possibly, for their efficacy, on the concurrence or acquiescence of every shareholder individually.

My judgment, as between the several persons concerned in this Company, between whom alone the present jurisdiction is exercised, is that, as regards any losses which have been incurred since June 18, 1844, the appellant is not liable. I think that the list should contain a qualification or statement similar to that adopted in *Hawthorn's case*(a). No costs can be given.

(a) Ante, p. 571.

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An appeal from this decision was heard before the LORD CHANCELLOR, on July 20th, when his Lordship confirmed the decision of the Master.

In consequence of the state of his Lordship's health, the hearing took place at his private residence, and no reporter was present; but the following are extracts from the short-hand writer's note of the judgment:—

“There is no doubt this is an extremely hard case. It is quite clear no harm was meant by the transaction which took place. The party thought, that, by the arrangement he entered into, he was relieved from all responsibility; but the difficulty occurs, and very great difficulty, considering the ground on which the *Vice-Chancellor* proceeded, from the shape and form in which this question arises. The way in which it arises is, that the Master is called upon under the act to make out a list of contributions; that is to say, a list of all persons who may be liable to contribute to the exigencies of the Company—to make good the funds of the Company. It is quite clear, therefore, that he was bound to include in that list all those who may be liable, under any circumstances, although, as against any particular shareholder, there may be an equity to protect them. Suppose, for instance, it should appear, a shareholder was cognisant of all this; that he was present at all the meetings; that he assented; and that he was privy to the purchase; and that that particular individual should hereafter, upon the winding up of the affairs, call in Mr. Morgan to contribute in respect of his liability, subsequent to 1844, towards the loss he is called upon to pay. In such a case as that, there may be an equity that may arise between individuals, although I cannot tell what, for we have not the facts of such a case before us. I think the Master was bound, under the act, to place this individual upon the list of con-

tributories. He cannot enter into the question between each individual shareholder. The question is, is he a shareholder, as between himself and the Company? Is he, under any circumstances, liable to contribute towards the fund?

“Now, this is a Company; it is no corporation; it is a mere partnership; and, although the majority of the partners may bind the minority upon every point the deed authorises by their common contract, yet they have no authority whatever to bind the minority on any matter that is not within the common contract. Now, the question is, what was the common contract?”

After discussing the clauses of the deed, his Lordship continued:—“It was a transaction, therefore, in which the shareholder has not adopted that course by which, and by which alone, under the provisions of the deed, he was to escape from the responsibility incident to his position as a shareholder; and that seems to have been the opinion of the *Vice-Chancellor*; because, no doubt, if he had thought that the liabilities ceased under any powers of the deed, he never would have resorted to the ground on which he did put it; namely, that he escaped, not from any power in the deed authorising it, but on account of the transactions which took place.”

After commenting on the proceedings at the meeting, his Lordship said—“I am also of opinion the meeting had no power to do what they did. If the deed was binding, it is admitted on all hands that they had no power. Well, being of opinion the deed was binding, they could not go out of the powers of the deed. The directors, and those who were there met together, bound themselves not to dispute what they then agreed upon. That may or may not be binding on individuals. I am not looking at what individuals are bound by; but is the partnership altogether bound—each and every of its members—by what took

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place at a meeting, which was called ostensibly for a purpose different from that which was the conclusion to which they came? The object, no doubt, was to raise money; but there is no specification in the notice as to the mode in which it was to be raised.

“ Well, then, as to acquiescence. The thing is not binding on the Company as such, and therefore cannot operate as any release to Mr. Morgan. Then, what is there to bind each and every member of the Company? because, although the partners may, no doubt, however numerous—as other people may—depart from the general contract, yet they cannot depart from it without the consent of every individual member. If what they do is not done within the limits of the contract which they had originally entered into, it is not binding on their co-partners. Having entered into a partnership for certain purposes, and under certain conditions, they may, if they please, among themselves, alter the contract, and enter into a new contract; but then, they cannot bind any one individual, and it cannot be said the partnership, as such, is bound, unless individuals are bound. They may change the constitution of the Company; but that is not what is done. As a partnership, consisting of each and every member who constituted the partnership, they are not bound by any resolution of a majority, or of those who may think proper to attend this meeting; least of all can they be bound when they were not invited to attend the meeting with a view of doing that which was ultimately done.

“ It appears to me, therefore, unfortunately for Mr. Morgan, that what was done was no release to him under the deed, and that the directors had no power to depart from the deed; and, as to the Company being bound by acquiescence, I cannot enter into that, unless I have it proved that every individual constituting the Company

was present; and I do not understand that to have been the case" (a).

(a) See 1 Hall & T. 320; 1 Mac. & Gor. 225.

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THIS was a motion to remove from the list of contributories without qualification, the name of Mr. Charles Hollwey, who had become a shareholder in the Company, and afterwards transferred his shares to Mr. Buckland, the director mentioned in the last case, under the following circumstances, as stated in the evidence in support of Mr. Hollwey's claim to be removed from the list.

In February, 1841, Mr. Hollwey was prevailed upon by the secretary, Mr. Wm. Lowther, to become an allottee of twenty 20*l*. shares in the Company, and paid the amount payable in respect of them.

He also executed the deed of settlement, the material portions of which are stated in the last case.

In February, 1842, a meeting of the directors and shareholders of the Company was held, at which it was resolved, in pursuance of the power and authority given by the deed, to issue new shares in the Company, to rate as 20*l*. shares, but upon each of which shares only 15*l*. were to be paid, and Mr. Hollwey had allotted to him five of such new shares, and paid in respect thereof 75*l*.

Shortly after the issue of the last-mentioned shares, Mr. Hollwey, having ascertained the danger he might eventually be brought into by having become a member of the Company, determined to dispose of his shares, and applied

At an extraordinary meeting of an unincorporated joint-stock Company, resolutions were passed, purporting to empower the directors, on behalf of the Company, to buy up the shares of any shareholder wishing to retire, on the terms of the purchase-money being paid in debentures, and of a further advance of the same amount being also made by the vendor, on the same security.

On a purchase being effected on these terms by a director, from a shareholder who was not aware that the director was not purchasing on his own account:—*Held*, that the share-

holder was not affected with constructive notice to the contrary; and, on his deposing that he had no actual notice, and there being no conflicting testimony, the Court directed the Master to review the list in which the shareholder was included as a "contributory" without qualification.

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to the secretary to find a purchaser for them, so as to relieve Mr. Hollwey from his responsibility, in pursuance of the 44th clause of the deed of settlement.

The secretary, on receiving this intimation, communicated it to some of the directors, who, to prevent the shares from going into the market just as the Company were about issuing new shares, offered to purchase the shares on behalf of the Company; but Mr. Hollwey being advised that the Company only had power to purchase shares out of the surplus fund of the Company, in pursuance of the 23rd clause of the deed of settlement, (but which surplus fund never existed), considered that a sale to the Company would not be valid, and that their liability would remain the same. He, consequently, declined to sell his shares to the Company or the directors, or any one of them, on behalf of the Company.

Some time afterwards, the secretary informed Mr. Hollwey that Mr. William Henry Buckland, a director and trustee of the Company, would purchase the shares at par, provided Mr. Hollwey would lend the Company the amount of such purchase-money, and a further sum of 500*l.*, to which Mr. Hollwey agreed; and a deed of transfer was prepared and executed by him, dated the 27th of June, 1842, by which the shares were assigned to Mr. W. H. Buckland, his executors, administrators, and assigns, absolutely.

Mr. Hollwey thereupon received the Company's debentures for the amount of the loan. The evidence produced before the Master, on the part of the official manager, to prove Mr. Hollwey to be a "contributory," was the deed of settlement and the payment of dividends.

The evidence in opposition was the evidence of Mr. Lowther, Mr. Hollwey's affidavit, which was to the above effect, and the certificates and deed of transfer.

For the purpose of obtaining further evidence, to establish the liability of Mr. Hollwey to remain on the list without qualification, Mr. Hollwey was summoned before

the Master, and examined *vivâ voce* by the counsel for the official manager.

The following were the material portions of this examination:—

Q. How long did you hold those twenty shares?—*A.* Why, not much longer.

Q. How long?—*A.* Till June, I believe.

Q. Do you know Mr. Lowther, the secretary of the Company?—*A.* I do.

Q. Did you make any application respecting parting with your shares?—*A.* My brother mentioned to him that we wished to dispose of our shares.

Q. And did Mr. Lowther inform you the Company wanted to purchase?—*A.* He said, the Company offered to purchase; but we objected to it.

Q. Why did you object?—*A.* Because they could not purchase, we considered, according to the deed.

Q. Who put that into your head?—*A.* I saw the deed.

Q. What did you see in the deed that made you think that?—*A.* Why, that they could only purchase out of the surplus capital, and they never had any.

Q. That was your construction?—*A.* That was my construction.

Q. Are you a lawyer?—*A.* No.

Q. Did you communicate that to your brother?—*A.* Yes. We talked of it, and objected to it on that ground; and the thing was dropped.

Q. Who took it up again?—*A.* Mr. Lowther.

Q. Do you remember the first time of seeing him?—*A.* Not the date.

Q. What did Mr. Lowther tell you? Give us the substance of his communication.—*A.* That Mr. Buckland would purchase the shares.

Q. Did you know Mr. Buckland?—*A.* I had seen him.

Q. Had you known him long before?—*A.* I never knew him till after I had got acquainted with the Brewery.

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Q. What was Buckland—one of the directors?—*A.* I suppose he was. I understood he was.

Q. You knew Mr. Buckland to be a director of the Company?—*A.* I supposed he was.

Q. Had you heard of Buckland buying shares of any one else?—*A.* No.

Q. Of no one?—*A.* No.

Q. Were you not aware at that time that he had bought some shares of other persons?—*A.* No: I have no recollection of hearing anything of the kind.

Q. Can you say you were not aware of it?—*A.* I was not.

Q. You were not aware that Mr. Buckland was buying shares in other quarters?—*A.* No.

Q. Did you see Mr. Buckland?—*A.* I did not on that subject.

Q. By whom was the negotiation conducted?—*A.* Mr. Lowther and my brother principally. I left it more to him; he had more to do with it than I had.

Q. Did you ask Mr. Lowther why Mr. Buckland was buying the shares?—*A.* I do not know that I did; it is six or seven years ago.

Q. Can you remember whether you did or not?—*A.* I cannot.

Q. I will ask you a plain question, and I hope you will give me an answer as plain as the question is: Had you not reason to believe, Mr. Hollwey, that Mr. Buckland was buying the shares on behalf of the Company?—*A.* No: I had not.

Q. Did you not believe it?—*A.* I did not.

Q. Did you believe that Mr. Buckland was buying these shares for his own purposes?—*A.* I did; if I had thought otherwise I would never have sold them to him. I thought it was an honourable transaction, or I would not have done it.

Mr. Bacon and Mr. G. L. Russell in support of the mo-

tion.—Mr. Hollwey, in June, 1842, transferred his shares to Mr. Buckland in the ordinary and regular way; and there is nothing to shew that he had any notice of the transaction being other than a transfer to a purchaser; nor is there any evidence to the contrary in the stipulation attached to the contract respecting the loan to the Company. Such a stipulation might be easily accounted for by the fact of Mr. Buckland having a great personal interest in the Company. The Company was indebted to him in a considerable amount, and, consequently, any fund being brought into the concern, as stipulated on the sale of the shares, enabled him to draw on the Company.

On the other hand, Mr. Hollwey expressly deposed, before the Master, when examined by the official manager in support of the case of the Company, that he had no suspicion of the transaction being different from what it appeared and purported to be; and his evidence is altogether uncontradicted.

Under these circumstances, it must be held that Mr. Hollwey is not liable in respect of any losses since June, 1842.

Mr. *Russell* and Mr. *T. H. Terrell* for the official manager.—Mr. Hollwey was, in June, 1842, a partner in the Company; and, if he chose to shut his eyes to what all the other shareholders were aware of, he cannot avoid being affected with constructive notice of the proceedings of the partnership to which he belonged. Those proceedings appeared upon the minute-books of the Company, to which he might have had access. If he would not resort to those sources of information, still he is in law considered to have done so, and to have been aware that Mr. Buckland was buying up shares on behalf of the Company, in pursuance of the resolution. It is very difficult to understand how he could have remained uninformed upon the subject without either a design to avoid information which might be

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inconvenient, or the utmost inattention to the affairs of the concern, neither of which can be allowed to place him in a better position than his fellow shareholders, or exempt him from contributing with them to the losses of the Company.

The VICE-CHANCELLOR:—

Without deciding, I assume that the true nature of the transaction between Mr. Lowther, Mr. Buckland, and the Company was such as it is on the part of the respondent alleged to have been.

Then the first question is, whether the circumstance of Mr. Hollwey holding shares in the Company, although he was not a director, was sufficient of itself to affect him with constructive notice of this state of things? I think it was not. I am not aware of any decision which has carried the doctrine of constructive notice to that length. And if I am to exercise my own judgment, in the absence of any authority, I decide as I have said.

If Mr. Hollwey believed that Mr. Buckland bought the shares on his own account, and was not affected with notice that such was not the true state of the case, can he be prejudiced by the circumstance that Mr. Buckland in fact bought the shares (if he really did so) on behalf of the Company?

Then, was it possible for a reasonable man in Mr. Hollwey's position to believe that Mr. Buckland, in his individual character, but as an individual interested in supporting the Company, was desirous of purchasing the shares, and was at the same time desirous that the Company should have the advantage of borrowing the amount which Mr. Hollwey advanced to them.

I am of opinion that a reasonable man might have believed this; and, on the evidence before the Court, I cannot conclude that Mr. Hollwey did not believe what a

reasonable man might have believed, and what he positively swears that he did believe.

I cannot, on the evidence, take it that he had notice of the transaction being (if it really was) such as it is represented to have been.

Being of this opinion, on this mixed question of law and fact, I must refer it back to the Master to review his report.

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MEMORANDA.

IN March, 1848, Sir *David Dundas* resigned his office of Solicitor-General to her Majesty, and was succeeded by *John Romilly*, Esq., one of her Majesty's counsel, who afterwards received the honour of knighthood.

On February 23, 1849, *Edward Lloyd*, *John Greenwood*, *Richard Malins*, *Frederick Calvert*, *Henry Singer Keating*, and *Roundell Palmer*, Esqrs., were appointed of her Majesty's counsel.

On March 6, 1849, *James R. Hope*, Esq., received a patent of precedence.

In Trinity Vacation, 1849, Sir *Thomas Coltman*, one of the Justices of the Court of Common Pleas, died, and was succeeded by T. N. *Talfourd*, Esq., the Queen's Ancient Serjeant.

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2. Lessees of wayleaves, under a lease granted by a copyhold tenant in fee of the land, entered into a negotiation for a new lease with the tenant for life, under the lessor's will, which gave the tenant for life power of leasing. A correspondence ensued, in the course of which the tenant for life offered to grant a new lease at a certain

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rent, which offer was accepted by the lessees. The original lease contained a clause, usual if not universal in the leases in the neighbourhood, giving the lessees the option of determining the lease on notice. The correspondence respecting the new lease was silent as to the insertion of such a clause; but one of the earliest letters alluded to the proposed lease as a renewal of the former:—*Held*, first, that the lessees might have understood that such a clause was intended to be inserted in the new lease, without putting a perverse or absurd construction on the correspondence; and that, whether such understanding was correct or incorrect, or was confined or not confined to the lessees, they ought not to be ordered to accept the lease without such a clause; secondly, that the tenant for life had not, under the will or otherwise, power to grant such a lease; and that the reversioner, though able to fulfil the agreement, was not entitled to demand a specific performance of it. *Ricketts v. Bell*, 335

Quere, whether, in executory agreements, there is a presumption in favour of the insertion in the executed contract of all such stipulations as are customarily inserted in such contracts.

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1. A testator bequeathed specific chattels, charged with the payment of a pecuniary legacy, and of all the testator's just debts and funeral and testamentary expenses, and he bequeathed other specific and pecuniary legacies, but made no residuary bequest:—*Held*, that, notwithstanding the charge, the general undisposed-of residue was first applicable. *Hewett v. Snare*, 333

2. A testator devised his real estate to trustees, in trust for sale, and, out of the proceeds and out of the rents till sale, to pay his debts, and the trustees' costs, charges, and expenses, and then upon trust to pay three legacies of 500*l.* each; and, as to all his personal estate and effects, the testator gave the same to T. R., his executors, administrators, and assigns:—*Held*, first, that the will did not give to T. R., nor dispose of the surplus of the beneficial interest in the produce of the testator's real estate, after paying the charges which ought to be considered as imposed thereon, and that such surplus belonged to the heir-at-law.

Held, secondly, that, as between the heir and T. R., the personal estate was the fund first applicable to the payment of the testator's debts.

Semble, that the 3 & 4 Will 4, c. 104, ought to have some influence in favour of the exoneration of the personal estate.

It was conceded, *arguendo*, that funeral expenses and costs of probate were not included in the costs, charges, and expenses of a testator's trustees. *Collis v. Robins*, 131

3. Where a testator's effects are insufficient to satisfy an annuity bequeathed by the will, and the pecuniary legacies:—*Held*, that the annuity ought to be valued, and that the annuitant was entitled at once to the amount of the valuation, subject to an abatement in proportion to the abatement of the pecuniary legacies; and that, although the annuitant died before the payment of the annuity in full would have equalled the abated amount of the valuation, the other legatees would have no claim to the surplus of that amount.

In a suit, instituted by a residuary legatee, the assets proved insufficient for the payment of the expenses and the general legacies:—*Held*, that the plaintiff was not entitled to his costs as between solicitor and client, except so far as the general estate had been increased by the proceeding.

The costs incurred by a legatee, who has instituted an administration suit, in attending before the Master by counsel, in support of his state of facts, held not to be within the 120th Order of May, 1845, as incurred upon a question relating to title. *Wroughton v. Colquhoun*, 357

4. Where a testator bequeathed to his widow two annuities, one payable to her so long as she should continue his widow, provided she should not permanently quit England before her daughter's marriage, and the other payable to her generally for life, and the assets were insufficient to pay the annuities and legacies in full, the Court ordered the annuities to be valued and to abate proportionally with the legacies, and directed the amount of the apportionment, in re-

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Trust funds were settled by deed, upon trust to pay the income to the settlor for life, and after his death to pay the income of a part thereof to E. M. for life, or "until he shall become bankrupt;" and after his decease, or "upon his becoming bankrupt," then in trust to pay the income of such part to the wife or widow of E. M., for her separate use, with remainder to the child or children of E. M., with a trust for accumulation, in case E. M. should have no such children or wife, and he should have forfeited his life interest. E. M. was, at the time of the execution of the

deed of settlement, an uncertificated bankrupt :—*Held*, that the income of E. M.'s share belonged to his wife for her separate use.

Under the same deed a like part of the same trust funds was settled upon trust for C. C. M., his wife and children, with similar conditions to those expressed concerning the share of E. M.; C. C. M. was, at the time of the execution of the deed of settlement, a bachelor, and an uncertificated bankrupt. C. C. M.'s share was directed to be invested, the income to accumulate. *Manning v. Chambers*, 282

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By a charter of Philip & Mary, in Latin, of January 6, 1553, after reciting, that eighteen presbyters, fifteen clerks, and twelve poor men, had been lately maintained at Boston out of the issues of certain guilds, since dissolved, and whereof the possession had been seized by the Crown, to the grief of all the Catholic inhabitants there: It was witnessed, that, considering a provision for divine worship, and the maintenance of the poor, and the education of youth, belonged to the regal office, and at the humble petition of the mayor and burgesses, and in consideration of the charges which they sustained in and about the reparation of the bridge and port, and that they might be better able to sustain these charges, the King and Queen granted certain lands to the corporation, to the intent that they should find and maintain a grammar-school in Boston, and a schoolmaster, two priests to celebrate divine service in the parish church, and four poor persons to pray for the souls of the King and Queen and their ancestors, with a direction to apply all the rents and profits "*ad sustentationem pedagogi et suppedagogi scole predictæ ac cappellanos*

COMPOSITION DEED.

et pauperes predictos et alia necessaria predict' burgum scholam capillanos et pauperes predict' et sustentationem et manutencionem eorundem tantummodo tangentia et concernentia :"—*Held*, that the trusts were for religious purposes, education, and the relief of the poor exclusively. Effect of usage in the construction of charters. *Att.-Gen. v. Corporation of Boston*, 519

CHATTEL.

See MORTGAGE, 1.

CODICIL.

See WILL, 9.

COLLUSION.

See PLEADING, 3.

COMMISSIONERS OF BANKRUPT.

See JURISDICTION, 2.

COMPANY.

See AGREEMENT, 1.

FRAUD.

INJUNCTION, 2, 3.

PUBLIC COMPANY.

WINDING-UP ACT.

COMPENSATION.

See VENDOR AND PURCHASER, 3.

COMPOSITION DEED.

Whatever may be the general rule, if there be any, as to extending indulgence to a creditor under a composition deed, who does not claim the benefit of the deed within the time specified therein; that rule does not apply to a creditor who actively refuses to come in under, or assent to the deed within the time limited, and who does not retract such refusal within that time. *Johnson v. Kershaw*, 260

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CONDITIONS OF SALE.

See VENDOR AND PURCHASER, 4.

CONSENT.

See LIMITATIONS (STATUTE OF).

CONSTRUCTION.

Trustees of a settlement were to stand possessed of the trust fund, (consisting of twelve-fifteenths of a larger fund), in trust, as to one share, for the settlor's daughter A., for her life, and then for her children, who were to take vested interests, if sons, at twenty-one, and if daughters, at twenty-one or marriage; and if A. should have no children who should live to attain a vested interest in the fund, then to stand possessed of the share so given to A. and her children, in trust, as to one moiety, for the settlor's daughter B. and her children, and, as to the other moiety, for his daughter C. and her children, under the same limitations and restrictions to which the gift to A. and her children had been subjected. Then followed similar dispositions of the remainder of the trust fund in favour of B. and her children, and C. and her children, with limitations over of each share, (in the event of either B. or C. dying without leaving children who should attain a vested interest,) to the other two daughters and their children, in moieties as before; but in case there should not be any child or children of A., B., and C. who should live to gain a vested and transmissible interest in the said twelve-fifteenth parts, or any part thereof, under and by virtue of the settlement, then the trustees were to pay, assign, and transfer the whole of the said twelve-fifteenth parts unto the next of kin of the settlor: the settlor died, having by his will made A., B., and C. his residuary legatees. After his death, C. died without issue; then B. died with-

out issue, leaving A. surviving her, who had two children, one of whom, a daughter, was married:—*Held*, that A., having a child who had lived to gain a vested and transmissible interest in the fund, was not entitled to any portion of it under the limitation to the “next of kin” of the settlor; consequently, that so much of the fund as did not pass under the limitations, other than that to the next of kin, resulted to the settlor, and passed under his will to his residuary legatees. *Westwood v. Slater*, 1

See CHARTER.

INJUNCTION, 3.

POWER, 1, 2.

PUBLIC COMPANY, 1.

WILL, 2, 3, 4, 5, 6, 12, 13.

CONTRACT.

See AGREEMENT.

CONTRIBUTORIES.

See WINDING-UP ACT.

CONVERSION.

See WILL, 7, 8.

COPYHOLD.

See JOINT TENANCY.

COSTS.

1. A plaintiff who inadvertently described herself as of a place which she had left at the date of the filing of the bill, was not ordered to give security for costs. And a motion for that purpose was refused; but the Court gave the defendant making it his costs, on his not putting the plaintiff to amend her bill. *Smith v. Cornfoot*, 684

2. *Quere*, whether a plaintiff who in his bill describes himself insufficiently, though not erroneously, will be ordered to give security for costs. *Sibbering v. Earl of Balcarras*, 683

3. Where the plaintiff only described

CREDITORS' SUIT.

himself as “working on the line of railway between Sheffield and Manchester:”—*Held*, that the description was insufficient; and a motion that he might give security for costs was ordered to stand over, to give him an opportunity of amending. *Sibbering v. Earl of Balcarras*, 683

See ASSETS, 3.

DISCLAIMER.

HUSBAND AND WIFE, 1.

INFANT, 6.

POWER, 2, 4.

PRACTICE, 3.

TRUSTEE, 1, 2.

VENDOR AND PURCHASER, 5.

COVENANT.

See VENDOR AND PURCHASER, 4.

CREDITORS' BILL.

See PLEADING, 1.

CREDITORS' SUIT.

In a creditors' suit for the administration of the assets of an intestate who had joined in a bond as a surety, the bond creditor being aware of the suit, omitted to prove till the time limited by the advertisements for creditors to come in had expired; a decree on further directions had been made, the administratrix had admitted assets, and the principal debtor in the bond had become bankrupt:—*Held*, that he might still be let in upon terms, the fund remaining undistributed.

An admission of assets by the administratrix, embodied in an order made on a petition in the cause, qualified by a declaration in a subsequent order. Arrangement of priorities between simple contract creditors, coming in within the time limited by the advertisement, and bond creditors coming in subsequently. *Brown v. Lake*, 144

See INFANT, 2.

DISCLAIMER.

CROSS SUIT.

See TRUST.

DAMAGES.

See INJUNCTION, 1.

DEBTOR TO ESTATE.

See PLEADING, 3.

DEBTS.

See ASSETS, 2.

CREDITORS' SUIT.

DECLARATORY DECREE.

See PLEADING, 4.

DECREE.

See ASSETS, 4, 5.

ELEGIT.

EVIDENCE, 6.

HUSBAND AND WIFE, 2.

JUDGMENT DEBT, 1.

PLEADING, 4.

SETTLEMENT (REFORMING).

STOP ORDER.

TRUST.

VENDOR AND PURCHASER, 2.

DEEDS.

See JURISDICTION, 1.

DEMURRER.

See PLEADING, 5.

DEVISEE.

See SET OFF.

TRUSTEE, 4.

DISCLAIMER.

Where, on a bill of foreclosure by a first mortgagee against a second mortgagee and the mortgagor, the second mortgagee by his answer disclaimed, yet the plaintiff brought the second mortgagee to the hearing, no costs were given to the second mortgagee, on the decree against him, upon

EVIDENCE. 791

the preponderance of modern decisions, though formerly the practice was to give such disclaiming second mortgagee defendant his costs, the plaintiff adding such costs to his own. *Ohrly v. Jenkins*, 543

See WILL, 12.

DISCOVERY.

See PRIVILEGED COMMUNICATIONS, 1, 2, 3.

DISMISSAL.

See PLEADING, 6.
PRACTICE, 2,

EASEMENT.

See VENDOR AND PURCHASER, 3.

ELECTION.

See WILL, 12.

ELEGIT.

In a suit by a judgment creditor, who had been in possession under an elegit, to have the real estates of the debtor sold, under 1 & 2 Vict. c. 110, the plaintiff must account in the same manner as a mortgagee in possession. *Bull v. Faulkner*, 685

EQUITY.

See HUSBAND AND WIFE, 4.
PLEADING, 4.

ESTATE TAIL.

See PROTECTOR.

EVIDENCE.

1. Where there are two defendants who have exactly the same defence, the 6 & 7 Vict. c. 85, does not render the evidence of one admissible in favour of the other. *Monday v. Guyer*, 182

2. Where proof is given of the loss of a written instrument by a docu-

ment, which itself shews that such instrument was originally insufficiently stamped, the Court will not presume that the instrument was ever properly stamped, nor admit ordinary secondary evidence of its contents. But the Court received as secondary evidence a draft of such written instrument, produced at the hearing, with such a stamp as the instrument itself required, although the instrument appeared to have been only lost by the party sought to be charged, and was not proved to have been fraudulently destroyed by him. *Blair v. Ormond*, 428

3. Discussion of the principles upon which hearsay evidence is admissible in cases of pedigree.

Quære, whether the reasons and grounds upon which births and times of births, marriages, deaths, legitimacy, consanguinity, &c., are allowed to be proved by hearsay (from proper quarters), in a controversy merely genealogical, are not applicable to declarations made by a deceased person as to where his family came from, where he came from, or "of what place" his father was designated.

Where, upon the trial of an issue, the evidence of a material witness being uncorroborated, and being in other respects unsatisfactory, has been discredited by the judge, and the jury have given a verdict against the party producing that witness, this Court, upon being satisfied, by affidavit filed since the trial, that the evidence of the witness may be substantially corroborated, will grant a new trial. *Shields v. Boucher*, 40

4. A decree directed an inquiry whether certain younger children had made any and what assignments of their shares, and under what circumstances. One of the defendants, claiming to be an assignee of a share, carried into the Master's office a state of facts setting forth the assignment under

which he claimed. A co-defendant (one of the children) carried in a counter state of facts, impeaching the assignment as having been executed for an inadequate consideration, and without legal assistance. A motion to suppress interrogatories filed in support of the counter state of facts, as relating to questions in dispute between co-defendants only, and not in issue in the cause, was refused. *Lenard v. Curzon*, 350

5. The Court refused to receive, at the hearing of a cause, the deposition of an accountant, containing a statement of the result of his examination of partnership account-books, where the books on which he made his statement were not in evidence; but, *semble*, that if the books had been in evidence, the deposition of the accountant, of the result of his examination of them, would be receivable as the evidence of a person of skill. *Johnson v. Kershaw*, 260

6. The tenant for life in possession of the real estate was also tenant for life of certain personal estates under the same will, and was the heir-at-law of the surviving trustee of the real estate, but was not a trustee of the personal estate. Two suits were instituted against him. One was instituted by the tenant for life in remainder of the real estate, complaining of mismanagement of that estate, and praying consequential relief, and particularly the removal of the tenant for life in possession from being trustee; the other suit was instituted by the first tenant in tail in remainder for the same objects, as regarded the real estate, but praying also relief in respect of the personal estate:—*Held*, that evidence taken in the former suit was not admissible in the latter, it not appearing that the witnesses were dead, or incapable of being examined.

The Court declined, except on con-

EVIDENCE.

sent, to make one decree in both the above suits. *Blagrove v. Blagrove*, 252

7. A witness deposed to having made a copy of a lost bond, and produced a copy, but omitted to identify it as that which he had made. By the decree, inquiries were directed, among others, as to the circumstances relating to the bond, and whether any debt remained due thereupon:—*Held*, first, that it was not fit to insert any direction in the decree, that the witness should be examined before the Master as to the matters included in his first examination; but that a distinct application ought to be made for such an order. *Held*, secondly, upon motion subsequently made by the plaintiff to the Court, that the case was a proper one for an order for the witness to be examined *vivâ voce* to the same matters as to which he had been before examined, and generally. *Stooke v. Vincent*, 705

8. After the examination of witnesses between all the plaintiffs and all the defendants, leave cannot be given to withdraw the replication and examine a defendant.

A witness permitted to be re-examined upon the former interrogatories after releasing his interest. *Bousfield v. Mould*, 347

9. In the prosecution of inquiries in the Master's office, the plaintiff brought in a state of facts, and examined under a commission witnesses whose evidence charged the defendants with the receipt of monies, and of whose depositions publication had passed. The defendants then brought in a state of facts, admitting the receipts, but discharging the defendants by payments. On motion, the Court gave the defendant liberty to issue a commission and examine witnesses in support of the discharge, but not to

FEME COVERT. 793

contradict the plaintiff's state of facts. *Parker v. Peet*, 216

10. Where an attesting witness to a deed had become blind:—*Held*, that it was not sufficient to prove the handwriting of the signatures, but that he must be also examined. *Rees v. Williams*, 314

11. *Quære*, whether a party can read the cross-examination of the witness of his adversary, where the latter does not read the examination in chief. *Barker v. Birch*, 376

See HUSBAND AND WIFE, 1.
MORTGAGE, 2.

EXAMINATION.

See EVIDENCE, 8.

EXCEPTIONS.

See INFANT, 5.
PLEADING, 7.
PRACTICE, 3, 6.

EXECUTION.

See PARTNERSHIP.
POWER, 2, 4.
SET-OFF.

EXECUTOR.

See PLEADING, 3.
SET OFF.
WILL, 10.
WINDING-UP ACT, 7, 8.

EXONERATION.

See ASSETS, 2.

FEME COVERT.

See HUSBAND AND WIFE.
STOP ORDER.
TRUSTEE, 1.
WINDING-UP ACT, 9.

794 FRAUDS (STATUTE OF).

FEOFFEE TO USES.

See JURISDICTION, 1.

FINE.

See JURISDICTION, 1.

FORECLOSURE.

See DISCLAIMER.

FORFEITURE.

See BANKRUPTCY.

PUBLIC COMPANY, 1.

FRAUD.

Three several allottees of shares in an intended railway company filed a bill against the directors, alleging that the deposit on the shares allotted to them respectively had been wholly paid by one of them, and that they were jointly interested in them; and, further, alleging circumstances to shew that the prospectus, on the faith of which the deposit was paid, contained untrue and delusive statements, which had been put forth by the defendants without any inquiry into their truth; and that the directors had kept back shares for the purpose of selling them at a premium. The bill charged that this was the purpose they had in view in carrying on the scheme, and not the benefit of the public, and prayed for a return of the deposit, with interest. A demurrer for misjoinder of plaintiffs, and want of equity, was overruled. *Cridland v. Lord De Maulay*, 459

See JURISDICTION, 1.

MORTGAGE, 2.

FRAUDS (STATUTE OF).

See MORTGAGE, 2.

VENDOR AND PURCHASER, 2.

HUSBAND AND WIFE.

FUNERAL EXPENSES.

See ASSETS, 2.

HUSBAND AND WIFE.

1. The circumstance that the solicitor of a husband and wife has transacted business relating to the separate estate of the wife, is not sufficient to make that estate directly liable for the amount of his bill of costs.

The joint answer of husband and wife may be read against the latter, with reference to her separate estate. *Callow v. Howle*, 531

2. Where the Master finds, by his report, that there is no settlement of a fund in court to which a married woman is entitled, it is the general rule that application should be made for payment to the husband, by petition presented after the decree on further directions has been made, in order that it may be in evidence before the Court, by affidavit, that, at the date of the decree on further directions, there was no settlement of the fund in court: yet, where the sum is small, (under 200*l.*), and all parties to the suit consent, the Court will not put the parties to the expense of a petition, but insert an order for payment to the husband in the decree on further directions. *Hedges v. Clarke*, 354

3. A testator gave several annuities to four unmarried nieces, a married niece, and a nephew, with a proviso for cesser on alienation: the testator declaring his intention to be, that the annuities should be received as some provision towards the maintenance of the annuitants during their lives, and that the annuity of the married niece should be for her sole and separate use:—*Held*, that the annuity of an unmarried niece was not limited so as to exclude the marital right of a husband with whom she subsequently married.

A husband, shortly after his mar-

INCOME-TAX.

riage, ceased to cohabit with his wife, and never provided her with a home, or contributed to her support, but left her to be supported by her sisters, whilst he received and appropriated to himself her income, and threatened her, by gestures as well as words, with personal violence. In a suit instituted by the wife against her husband and the trustees of an annuity of 50*l.*, (which appeared to be all her income,) the Court directed the annuity to be paid to her for her support, till further order. *Gilchrist v. Cator*, 188

4. In a bill purporting to be exhibited by an infant plaintiff by her next friend, she was described by her maiden name, but was, in fact, clandestinely married. The Court refused a motion made on behalf of her husband (a defendant), to have the bill taken off the file.

The estate of a feme covert, tenant in tail in possession, subject to a jointure term, is equitable during the continuance of the term, for the purpose of entitling her to a settlement, on a bill filed by her.

And the Court directed a settlement, although the bill did not expressly pray to that effect. *Wortham v. Pemberton*, *Newenham v. Pemberton*, 644

See STOP ORDER.
TRUSTEE, 1.
WINDING-UP ACT, 9.

IMPERTINENCE.

See PRACTICE, 3, 6.

IMPLICATION.

See WILL, 6.

INCOME TAX.

See VENDOR AND PURCHASER, 6.

INFANT.

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INDEMNITY.

See VENDOR AND PURCHASER, 4.

INFANT.

1. A man cannot be charged in equity, after his majority, on a purchase, or sale, or contract, made during his minority, on the mere ground that, without any false assertion by the infant, the other party believed he was not a minor, and dealt with him on the supposition that only adults could enter into such transactions. The Court, therefore, refused to entertain a bill for an injunction to restrain an action brought to recover certain railway shares which had been sold and assigned by deed to the plaintiff in equity by the plaintiff at law, during the infancy of the plaintiff at law, there being no evidence against the plaintiff at law of misrepresentation as to his infancy. *Stikeman v. Dawson*, 90

2. In a creditors' suit the Court has no jurisdiction, under 1 Will. 4, c. 47, or 2 & 3 Vict. c. 60, to extend the sum to be raised by way of mortgage by an infant, for payment of the debts of his ancestor or deviser, so as to include money required for repairs, even where such repairs are necessary in order to obtain an advance on mortgage, and where a mortgage is much more beneficial for the infant than a sale would be. *Hill v. Maurice*, 214

3. The guardian of A. B., (an infant,) appointed by the Ecclesiastical Court, grants a lease of the infant's lands, receiving a premium, and, at the time of granting the lease, the infant is present, and represents to the lessee that the lessor is his guardian. The infant is also an attesting witness to the lease. He attains his majority, and then grants a lease of the same lands to another

lessee. On a bill filed by the former lessee against A. B. and the new lessee, to have the first lease confirmed, or the premium refunded with interest, a decree made according to the latter alternative of the prayer. *Eron v. Nicholas*, A.D. 1733, *in notis*, 118

4. *Semble*, that 1 Will. 4, c. 56, s. 32, empowering the Court, on the petition of the guardian of an infant, to direct payment of maintenance out of dividends of stock standing in infant's name, does not authorise the appointment of a guardian, and a direction for payment of dividends upon the same petition, although the guardian appointed is one of the petitioners, but that two petitions are proper. *In re Pongerard*, 427

5. Where one of the principal facts relied upon by the defendants, contending, on a reference before the Master, that a suit was not for the benefit of the infant plaintiffs, was, that the assets were too small to justify the proceedings:—*Held*, that, as this fact could not be properly determined by the Court, on exceptions to the report, finding in favour of the prosecution of the suit, such exceptions must be overruled, reserving the costs and detaining the deposit.

But, upon the plaintiffs afterwards presenting a petition to confirm the report, the Court, on the defendants undertaking to offer no obstacle to the cause being heard, whenever the plaintiffs should think fit, directed the petition to stand over till the hearing.

Quere, whether the proper mode of appealing from the Master's decision, in such a case, is by filing exceptions, or by opposing the petition to confirm the report. *Raven v. Kerl*, 242

6. The petition of an infant plaintiff in a cause, is the petition of his next friend, and the next friend was

ordered to pay costs. *Jones v. Lewis*, 245

See PRACTICE, 4.

WINDING-UP ACT, 10, 11.

INJUNCTION.

1. Upon the invasion of a patent right, the party complaining has a right to the protection of an injunction, although the other party may promise to commit no further infringement, and may offer to pay the costs of preparing the bill; and if the defendant do not, after injunction obtained, offer to pay the costs of it, the plaintiff may bring the suit to a hearing, and will be entitled to the costs of the suit.

Quere, whether, in such a case, the Court will give an account of damages. *Geary v. Norton*, 9

2. Shareholders in an incorporated navigation company filed a bill to restrain the committee of management from entering into or carrying into effect an agreement with the trustees of a projected railway company, for amalgamating the two undertakings. On the motion for an injunction, it appeared from the defendants' affidavits that the corporate seal of the navigation company had been affixed to the agreement with the railway trustees:—*Held*, that the railway trustees were necessary parties to the suit, and the motion ordered to stand over, with leave to amend the bill, by making them parties.

On the motion being renewed upon the amended record, the Court refused the injunction, the navigation company and the committee of management undertaking not to apply any further part of the funds of the navigation company in any manner not authorised by the Navigation Acts, unless under the authority of Parliament, and all the defendants undertaking to consent to the plaintiffs being treated as

INJUNCTION.

persons entitled to oppose the railway bill in Parliament.

Quere, whether a cestui que trust can have an injunction to restrain his trustees from assenting to a bill in Parliament. *Parker v. The River Dunn Navigation Company*, 192

3. The proprietor of a pier erected under the powers of an act of Parliament, which were to be exercised during a certain limited period, was authorised by the act to demand certain specified tolls for the use of the pier when completed. By an agreement between him and a railway company, he agreed to complete his pier at a considerably earlier time than he was bound to do by the act, and the company agreed to complete a branch railway to the pier by the same time; but the agreement contained no stipulations as to opening the pier or railway, or as to the terms on which the pier was to be used. The owner of the pier completed it accordingly, but refused to permit the railway company to use it, except upon terms to which the company declined to accede. The Court refused to grant, on motion, an injunction restraining the owner of the pier from obstructing the use of it by the company at the statutory tolls. *Furness Railway Co. v. Smith*, 299

4. An injunction, granted to restrain the defendant, who had removed the partnership books from the place of business, from keeping them at any other place. *Greatrex v. Greatrex*, 692

5. A devise of a park to successive tenants for life, with remainder in tail, contained a proviso that neither a specified tenant for life, nor any other person, should mow any part of the park; but there was no executory devise over in the event of this restriction being broken:—*Held*, that the restriction was one which might be

JUDGMENT.

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enforced by injunction. *Blagrove v. Blagrove*, 252

See JURISDICTION, 4.
MORTGAGE, 3.
PLEADING, 4.
PUBLIC COMPANY, 2, 4.

INSOLVENT.

See JURISDICTION, 2.

INTERROGATORIES.

See EVIDENCE, 4.

ISSUE.

See EVIDENCE, 3.
POWER, 4.

JOINT STOCK COMPANY.

See FRAUD.
PUBLIC COMPANY.
WINDING-UP ACT.

JOINT TENANCY.

Two women being joint-tenants of copyhold lands, one of them and her husband surrendered their estate and interest, to the intent that the lord should regrant the same to such person or persons as the husband should by will appoint: the wife died in the lifetime of her husband and sister: the husband afterwards died, having by his will appointed the surrendered share to his executors:—*Held*, that there was a severance of the joint tenancy. *Edwards v. Champion*, 75

See TENANT IN COMMON.

JUDGMENT.

In a suit by a judgment creditor, who had been in possession under an elegit, to have the real estates of the debtor sold under 1 & 2 Vict. c. 110, the plaintiff must account in the same manner as a mortgagee in possession. *Bull v. Faulkner*, 685

JUDGMENT DEBT.

1. Decree for specific performance, with references to the Master to compute interest and tax costs; and ordering defendant to pay purchase-money and interest, and costs when ascertained:—*Held* to constitute a judgment debt. *Duke of Beaufort v. Phillips*, 321

2. Judgment debt, payable at a future day, and subject to be defeated in the event of the previous death of the debtor:—*Held* to be a charge under the 1 & 2 Vict. c. 110, s. 13, upon an annuity bequeathed to the debtor, and payable out of real estate, but not so as to affect growing payments accruing due before the judgment debt became payable. *Younghusband v. Gisborne*, 209

JURISDICTION.

1. By an antenuptial settlement, lands of the wife were released to the use of the releasees to uses and their heirs, during the joint lives of the husband and wife and the life of the survivor, on certain trusts, with a limitation to the use of the wife in fee, in the event (which happened) of there being no issue of the marriage. After the death of the husband, who survived the wife, the surviving releasee to uses, with a tenant in possession of the land under a lease from the husband, made a feoffment and levied a fine to the use of himself in fee:—*Held*, that a court of equity might entertain a suit instituted by the heir-at-law of the wife against the releasee to uses, to recover possession of the land and the title-deeds.

Semble, that the surviving releasee to uses, after the determination of his own legal estate, had no rightful title to the custody of the title-deeds, and could not be considered as holding them as a trustee for the reversioner; but,

Semble, that the fine was fraudulent,

and that, whether void at law on that ground or not, the question of its validity ought not of necessity to be left to the decision of a court of law. *Reece v. Trye*, 273

2. Where an insolvent, on his return from attending the Court of Bankruptcy on his own petition for protection, under 5 & 6 Vict. c. 116, was arrested under an attachment of the Court of Chancery, his application to the Court of Chancery to be discharged, was held improper, and refused. *Plomer v. Macdonough*, 232

3. An order was made at the Rolls for the delivery by a solicitor of his bill of costs, which was accordingly delivered and paid. Any subsequent application for the delivery of deeds and documents of the client, in the solicitor's possession, should be made to the Rolls, and not to any other branch of the Court. *In the Matter of Mills*, 643

4. Where a cause has been transferred from one branch of the Court to another, the latter will not question the correctness of the exercise of judicial authority by the former on a previous application.

But where it appears that a plaintiff, on obtaining *ex parte* an injunction from one branch of the Court, had withheld information which might have induced that branch of the Court to make a different order, the injunction so obtained may be dissolved on that ground by another branch of the Court to which the cause has been transferred. *Sturgeon v. Hooker*, 484

See LACHES.

WINDING-UP ACT, 1, 2.

LACHES.

A plaintiff was required to account for the delay of nineteen years in filing his bill, where the circumstances of the parties had changed by deaths; and the foundation of the suit being a legal

LIMITATIONS (STATUTE OF.)

demand, the Court, after such delay, declined to act, unless the demand was established in an action. *Blair v. Ormond*, 428

LANDS CLAUSES ACT.

See PUBLIC COMPANY, 4.

LEASE.

See AGREEMENT, 2.

LEGACY.

See ASSETS, 1, 3, 4.

WILL, 2, 3, 4, 5, 7, 9, 10, 11, 12.

LETTERS PATENT.

See INJUNCTION, 1.

LIEN.

See MORTGAGE, 1, 2.

LIMITATION.

See BANKRUPTCY.

LIMITATIONS (STATUTE OF).

In 1825, the holder of a promissory note brought an action against the maker, who became lunatic; whereupon the lunatic and his committee filed a bill to restrain proceedings in the action, on the ground of alleged insufficiency of consideration for the note; and, upon the motion for an injunction, an order was made, *by consent*, staying proceedings in the action and the suit, with liberty for the holder of the note to go in and establish his claim in the lunacy. He accordingly took proceedings to support his claim before the Master in lunacy, who, however, disallowed it, and in August, 1830, made his report, without including in it the name of the holder of the note as a creditor. The lunatic died in March, 1843; and, in February, 1844, the

MORTGAGE.

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holder of the note filed a creditors' bill against the representatives of the lunatic:—*Held*, that the plaintiff was not entitled to be relieved from the effect of the Statute of Limitations. *Rock v. Cooke*, 675

See PLEADING, 1.

LUNACY.

See LIMITATIONS (STATUTE OF).

MARRIED WOMAN.

See HUSBAND AND WIFE.

STOP ORDER.

TRUSTEE, 1.

WINDING-UP ACT, 9.

MASTER.

See PRACTICE, 1, 6.

MASTER'S OFFICE.

See EVIDENCE, 4.

MEMORANDA,

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MISTAKE.

Where, by the mutual mistake of vendor and purchaser as to the duration of a leasehold interest, it had been sold at a price considerably below its value, and the assignment had been executed, and the purchaser let into possession:—*Held*, upon a bill filed some years afterwards by the vendor against the representatives of the purchaser, that the vendor was not entitled to be relieved against the mistake. *Okill v. Whittaker*, 83

MORTGAGE.

1. The owner of a vessel made a mortgage of it and of the cargo, in London, to A., whilst the vessel was on a whaling voyage to the South Seas, subject to two prior mortgages thereof; and the third mortgagee forthwith gave notice of his mortgage to the two prior incumbrancers. The mas-

ter of the vessel afterwards, putting into Sidney, transshipped the oil taken in the voyage to another vessel, consigned to consignees in London, who honoured his bill of exchange on them, upon having a lien on the consignment. The mortgagor induced B. to advance him 1000*l.* on a mortgage of the cargo so transshipped and consigned, without notice of any other charge thereon, except the lien of the consignee. B. gave notice of his mortgage to the consignee. A., as soon as he knew of the consignment (but subsequent to B.'s notice), gave notice to the consignee of the mortgage to him; and, after such notice, the consignee, after satisfying his own lien, paid over the balance of the proceeds of the oil to B.:—*Held*, that A., having done all he could do towards possession, was entitled to priority over B. *Feltham v. Clark*, 307

2. A mortgagee of leaseholds for 1150*l.* enters into a parol agreement with the mortgagor to concur in a new mortgage for 750*l.*, to be paid to the original mortgagee in reduction of her debt, so that the new mortgage should be the first charge; but upon an express understanding that the mortgagee should execute to her a second mortgage for the balance. The new mortgage was executed accordingly, and it recited, that the original mortgagee had agreed to accept 750*l.*, and to release the premises from the monies secured by the original mortgage, and to make other arrangements with the mortgagor for payment of the residue of the 1150*l.*; and the deed witnessed, that, in pursuance of such agreement, and in consideration of 750*l.* paid to the original mortgagee, she and the mortgagor assigned the mortgaged premises to the new mortgagee for 750*l.*, discharged from the original mortgage. Afterwards, the 750*l.* was

paid off by another person to whom the mortgagor applied for that purpose, on an agreement for an assignment; but all parties had notice of the agreement with the original mortgagee. On the original mortgagee filing a bill to be declared first incumbrancer, or to redeem:—*Held*, that she might adduce parol evidence of the agreement with her, and was entitled to redeem on payment of the 750*l.* and interest, but had not a lien prior to that of the person who had last advanced that sum. *Banks v. Whittall*, 536

3. The circumstance that a mortgagee, with power of sale, has entered into a contract to sell a portion of the property comprised in the security for a sum greater than the amount due on the mortgage, held not a sufficient ground for restraining him from prosecuting an action upon the covenant for payment contained in the mortgage deed. *Willes v. Levett*, 392

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Shares in the London Dock Company, and in the East and West India Dock Company,—*Held* not to be interests in land within the Statute of Mortmain, 9 Geo. 2, c. 36. *Hilton v. Giraud*, 183

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1. In a suit by the trustees of a composition-deed, to compel the assignor to perfect the transfer of a portion of the trust property, the cestuis que trustent are not necessary parties, but a purchaser to whom the trustees had contracted to sell the property in question, is a necessary party. *Alexander v. Cana*, 415

2. Where it appeared, by a statement in an answer, that C., who was not a party to the suit, had an interest in the subject-matter of the suit, but the objection, on account of C.'s absence, was not taken by any of the answers:—*Held*, that this was a case within the 40th of the General Orders of August, 1841, and the Court made a decree in the suit saving the rights of C. *Feltham v. Clark*, 307

3. The bill alleged, that the plaintiffs represented one of four next of kin of an intestate, and prayed the usual administration accounts against the administrator, and the apportion-

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ment of one-fourth of the residue, and its payment to the plaintiffs. The plaintiffs served the three other next of kin with copies of the bill, under the 23rd order of August, 1841. The defendant, the administrator, claimed to be allowed for certain payments out of the intestate's estate, as having been made with the sanction of one of such three next of kin. The Court disallowed an objection by the administrator at the hearing, that the three next of kin, who had been served with copies of the bill, but did not appear, were necessary parties, and made a decree in their absence. *Knight v. Cawthron*, 714

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Effect in equity of an execution against the share of one of two partners in the partnership stock. *Habershon v. Blurton*, 121

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equitable mortgagee, being also a specialty creditor, who seeks to charge the real assets of a testator generally, as well as to enforce his security, is on behalf of the plaintiff, and all other the creditors of the testator; and the Court permitted a plaintiff at the hearing to amend his bill accordingly; and, (with reference to the Statute of Limitations):—*Held*, that such bill must date from the day of the filing of the original bill, and not from the day of the amendment. *Blair v. Ormond*, 428

2. *Quere*, whether the circumstance of an administrator ad litem being made a defendant to an administration suit, is sufficient to satisfy the Court that there are no personal assets, and to warrant a decree being made at once against the real estate, without the usual preliminary accounts of the personal estate.

But where the plaintiffs, in such a suit, were persons who could obtain general administration, *Held*, that, in such a case, the personal estate was not sufficiently represented by an administrator ad litem.

And where it did not appear upon the bill, that the administration was so limited, and no objection for want of parties was taken by the answer, the Court did not make a decree, saving the rights of absent parties, under the 11th Order of August, 1841, but allowed the objection when made at the hearing, and gave leave to amend. *Robinson v. Bell*, 630

3. There may be circumstances under which the Court will, at the suit of universal legatees under a will, direct an account against a debtor to the testator's estate, without collusion being established between the debtor and the personal representative, or any evidence of insolvency on the part of the latter, or of his refusal to sue the debtor, other than his omission to in-

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4. A bill filed by certain members of a lodge, forming part of an association called "The Independent Order of Odd Fellows" (which consists of many corresponding lodges, and many thousand members), against other members of the lodge, complaining of being excluded from the lodge, and praying for a declaration that such exclusion was illegal and void, and for an injunction to restrain the defendants from applying a sum of 148*l.* 3*s.* 4*d.* otherwise than according to the rules of the lodge, and for an account (if necessary) of all the property and funds of the lodge, and a declaration of the rights and interests of the parties, and for all necessary directions for giving effect thereto, and for an injunction and receiver, and general relief:—*Held*, on demurrer, not to be a case in which an injunction would be proper without other relief, or without view to other relief.

Held, also, that it does not belong to the functions of the Court to make a decree containing declarations of right alone, or, in such a case as the above, a declaration of right and an injunction only.

Held, further, that the only relief sought, independently of this injunction, was such as the Court could not grant with the parties then before it; and that, as the defect could not be remedied without rendering this suit unmanageable, leave to amend ought not to be given.

Quere, whether the above associa-

tion is legal, and whether a court of equity will recognize a contract of association, which, although morally laudable, is, from the number of persons concerned in it, or otherwise, of such a nature as not to enable any of the established judicatures of the realm to deal with it beneficially, or whether such associations must not be left to regulate themselves by a moral rule, without judicial interference. *Clough v. Ratcliffe*, 164

5. More than twelve days after bill filed, a defendant filed a pleading which was a demurrer, and also an answer to the whole bill:—*Held*, that notwithstanding the 37th Order of August, 1841, the answer overruled the demurrer, and that it was not necessary to move to take the pleading off the file as irregular. *Skey v. Garlike*, 396

6. Upon a bill filed for discovery and relief, a plea to all the relief, but not in form to all the discovery, is not a plea to the "whole bill" within the meaning of the 48th and 49th Orders of May, 1845; and where, after the expiration of three weeks, a defendant having so pleaded to all the relief, but not to all the discovery, obtained, as of course, an order to dismiss the bill:—*Held*, that such order was irregular.

An order to amend, after a plea to all the relief, and an answer to the discovery asked by a bill, is not to be obtained as of course under the 66th Order of May, 1845; and an order so obtained was discharged with costs. *Neck v. Gains*, 23

7. An exception to an answer held to have been properly allowed, although it set out inaccurately the interrogatory, the answer to which was the subject of exception, there being, besides the inaccurate transcript of the interrogatory, a reference to it by its number:—*Seemle*, that the refer-

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1. Upon the construction of an instrument creating a power of raising portions:—*Held*, that the donee had a right to distribute the portions unequally. *Cotgreave v. Cotgreave*, 38

2. A donee of a power affecting two sums of Stock of different descriptions, appointed a gross amount, part of one of them, and exceeding one-fourth part of it. Afterwards, she executed successively, deeds purporting to appoint aliquot parts of both funds, as one subject, and without noticing the previous appointment of the gross sum, which was never severed from the mass. The appointees comprised all the parties entitled, subject to the appointment, and the aliquot parts so appointed amounted to four-fifths, thus exceeding, with the earliest appointment, the entirety of one of the funds.

Held, that the latest appointees were not entitled to put the earlier to their election, so that the excess might be made good out of the unappointed one-fifth of the unexhausted fund.

Held, also, that the successive appointments of the aliquot parts operated upon aliquot parts of the whole of each fund, and that, therefore, the loss arising from the deficiency of the one fund fell upon the last appointees.

A tenant for life of a trust fund, with power to appoint the reversion to a child, appointed a portion of the reversionary fund to a daughter absolutely, by a deed to which the daughter,

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1. Upon the construction of an instrument creating a power of raising portions:—*Held*, that the donee had a right to distribute the portions unequally. *Cotgreave v. Cotgreave*, 38

2. A donee of a power affecting two sums of Stock of different descriptions, appointed a gross amount, part of one of them, and exceeding one-fourth part of it. Afterwards, she executed successively, deeds purporting to appoint aliquot parts of both funds, as one subject, and without noticing the previous appointment of the gross sum, which was never severed from the mass. The appointees comprised all the parties entitled, subject to the appointment, and the aliquot parts so appointed amounted to four-fifths, thus exceeding, with the earliest appointment, the entirety of one of the funds.

Held, that the latest appointees were not entitled to put the earlier to their election, so that the excess might be made good out of the unappointed one-fifth of the unexhausted fund.

Held, also, that the successive appointments of the aliquot parts operated upon aliquot parts of the whole of each fund, and that, therefore, the loss arising from the deficiency of the one fund fell upon the last appointees.

A tenant for life of a trust fund, with power to appoint the reversion to a child, appointed a portion of the reversionary fund to a daughter absolutely, by a deed to which the daughter,

the daughter's husband, and the trustees of the fund were parties; and by the same deed she assigned her life interest in the appointed portion, to the daughter absolutely. By a subsequent witnessing part, it was expressed to be agreed and declared by and between all the parties, that the appointed portion should be held on trust for the daughter's separate use, during her life, and afterwards on trusts for her husband and children:—*Held*, that, (independently of any question as to the merger of the life estate), the trust for the separate use was good. But *quære*, whether the limitations of the subsequent interests were effectual.

The rule that the costs arising from difficulties of construction fall on the residuary estate, does not apply to an unappointed portion of a fund. *Trollope v. Routledge*, 662

3. By a settlement of 1813, Stock was settled upon trust, in the events which happened, for such persons as a married woman should, during and notwithstanding coverture, (among other modes,) by her last will and testament in writing, or any writing purporting to be, or in the nature of, a will, to be by her duly signed and delivered, in the presence of, and to be attested by two or more credible witnesses, give, direct, limit, and appoint. The husband of the donee died in 1819, and the donee in 1840. After the death of the donee of the power, a writing was found in the form of a letter, and sealed on the outside only, purporting to bear date August 20th, 1816, and to be made in execution of the power, and concluding thus: "As witness my hand and seal," with a signature purporting to be that of the donee, and two other names in other hands-writing, but with no memorandum of attestation. On a reference to the Master, in 1847, as to the form and

manner of the execution of this paper, no evidence could be produced, but such as was afforded by the document:—*Held*, that the document was not shewn to be a due execution of the power. *Burnham v. Bennett*, 513

4. A testator devised his real estates to J. H. and A. L., upon trust, immediately upon the happening of either of two events, (i. e. his niece's attaining twenty-five or marrying,) to settle the same, or such part thereof, as the trustees should think proper, to the use of the niece for life, with remainder to the use of her children, as she should appoint, and, in default of appointment, to her children, with remainder to the use of A. L. and her heirs absolutely; and as to such parts as the trustees should not think fit so to settle, (with respect to which the testator gave them absolute discretion,) upon trust to convey the same to S. L. (who was the testator's heir-at-law) in fee. In 1831, J. H. and A. L. proved the testator's will, and accepted its trusts. J. H. shortly afterwards desired to retire from the trust, and a deed was executed, but not in conformity with the trusts, purporting to appoint J. O. a trustee in his stead, but no conveyance was executed to J. O. In 1842, J. H., A. L., and J. O. executed a deed, purporting to be made in exercise of the power of appointment given by the testator's will to his trustees, and thereby appointed the estate to A. L. in fee, J. H. executing this deed on receiving an indemnity from A. L. and her solicitor:—*Held*, that the direction to settle was not a power in the nature of a trust which would prevail if no appointment was made, but was purely discretionary, and that the effect of the original trustees remaining inactive was to leave the beneficial interest to result to S. L., the heir-at-law. *Held*, also, that the deed of 1842

was not a proper execution of the power.

An heir-at-law, claiming by bill as such, stated his title in detail. The defendants, by their answer, put him to prove such title, but neither asserted nor suggested that there was any other heir. The plaintiff proved his pedigree in the cause.

Held, that the Court might and ought to decide the disputed question of pedigree, without sending it to a jury; and it appearing that the evidence of heirship was, previously to the institution of a suit, submitted to the defendants, the trustees, and was such as they ought to have been satisfied with, the Court gave the plaintiff the costs of the suit as against the trustees, including the expenses of the genealogical evidence. *Lancashire v. Lancashire*, 288

See AGREEMENT, 3.

PRACTICE.

1. Answer.

Part of the assets of a testator were in the course of administration in India, by an official administrator appointed there. Before they were completely administered, a legatee's suit was commenced in this country against the executrix who had proved the will here, and who, after obtaining from the Master successive orders extending the time for putting in her answer, obtained one more order, giving her six weeks' further time. This order was made upon an affidavit of her solicitor, setting out a letter from the Indian administrator, who promised to remit the balance due from him by the next mail, and stating that the receipt of this balance and of the administrator's accounts were necessary to enable the defendant to put in a complete answer:—*Held*, that although the Court might not itself have thought fit to grant

the indulgence, the order ought not to be discharged. Principles on which the Court proceeds in reviewing the Master's decision on such points. *Nott v. Nott*, 373

2. Dismissal of Bill.

Where, in an injunction suit, the plaintiffs moved before answer that the bill might be dismissed, and that the defendants might pay the costs of the suit, on the ground that the suit was occasioned by their wrongful act, and that all the purposes of it had been attained by the motion for an injunction, the Court, although considering such an application reasonable, declined to introduce a new practice by making the order. *Langham v. Great Northern Railway Company*, 503

3. Exceptions.

Exceptions to answer will not be ordered to be taken off the file, because the order of reference is not served in due time; but if the plaintiff serves the order after the time, and obtains a warrant, the defendant is entitled to apply to the Court for his costs. *Atlee v. Gibson*, 162

Semble, that an exception to the report, for that the Master has found the said state of facts impertinent, from the word "&c." to the word "&c.;" whereas the Master ought not so to have found, but ought to have found that the same was not impertinent, is sustained, if any part of the passage is pertinent. *Raven v. Kerl*, 236

4. Infant.

A reference as to which of two suits is most for the benefit of infant plaintiffs, does not of itself stay the proceedings in the suit. *Westby v. Westby*, 410

5. Service.

An affidavit of service of a copy of a bill is insufficient, if it omit in the

title the name of one of the parties, although no process is prayed by the bill against such party. *Lay v. Prinsep*, 630

The circumstances, that certain solicitors had acted as the solicitors of a defendant to a foreclosure suit in several other matters, including a suit relating to the estate which was the subject of the foreclosure suit, and that such defendant could not be found, so as to be personally served with a subpoena, to answer the bill of foreclosure:—*Held* insufficient grounds for ordering substituted service on the solicitors to be good service on him. *Hurst v. Hurst*, 694

Held, that a letter from a defendant, admitting the receipt of a copy of a subpoena, was not sufficient evidence that he had been served, for the purpose of entitling the plaintiff to enter an appearance for him, although all attempts to serve him personally had failed, and there was reason to believe he kept out of the way to avoid service. *Gathercole v. Wilkinson*, 681

Where a subpoena to answer an amended bill had been served on defendant's solicitor:—*Held*, that an appearance could not be entered by the plaintiff for the defendant, under the 29th Order of May, 1845. *Sewell v. Godden*, 126

6. State of Facts.

Where the Master has expunged matter in a state of facts for impertinence, he should nevertheless issue his certificate thereupon, in order that the opinion of the Court may be taken if requisite.

To such certificate exceptions may be taken.

Where there is a doubt as to a passage being impertinent, it should be retained, and considered on the question of costs. *Raven v. Kerl*, 236

7. Subpoena.

A defendant served with an irre-

gular copy of a subpoena, to appear and answer, has a right to have such service discharged, with costs, if he applies speedily; and he may be heard upon entering a conditional appearance with the Registrar. *Johnson v. Barnes*, 129

8. Traversing Note.

Traversing note taken off the file, at the instance of the defendant, asking for leave to put in his answer after replication. *Towne v. Bonnin*, 128

See CREDITORS' SUIT.

DISCLAIMER.

EVIDENCE, 4, 6, 7, 8, 9.

HUSBAND AND WIFE, 2, 4.

INFANT, 4, 6.

JURISDICTION, 4.

PARTIES, 2.

PLEADING, 5, 6.

PUBLIC COMPANY, 4.

STOP ORDER.

TRUSTEE, 3.

VENDOR AND PURCHASER, 7, 8.

WINDING-UP ACT, 16 to 24.

PRESUMPTION.

See POWER, 2.

PRIVILEGE FROM ARREST.

See JURISDICTION, 2.

PRIVILEGED COMMUNICATIONS.

1. Upon settling interrogatories for the examination of a vendor in the Master's office, on a question of title between vendor and purchaser:—*Held*, that the vendor was not compellable at the instance of the purchaser to state his motive for making a certain appointment, or to disclose confidential communications made by him to his solicitor and counsel respecting the property, although such communications were made merely on behalf of the consulting person singly.

and were not made during a suit, during a dispute, or after the threat of a suit.

Quere, whether the client is compellable to disclose any confidential communications between him and his solicitor or counsel, which his solicitor or counsel would be privileged in refusing to disclose. *Pearse v. Pearse*, 12

2. Cases laid before counsel, on behalf of a client, stand upon the same footing as other professional communications from the client on the one hand to the counsel or solicitor on the other; and as far as relates to any discovery by the counsel or solicitor, the question of the existence or non-existence of any suit, claim, or dispute is immaterial. *Pearse v. Pearse*, 12

3. An attorney held bound to discover when and to whom he parted with documents of title of his client, and in whose possession the same were. *Banner v. Jackson*, 472

PRIVITY.

See MORTGAGE, 2.

PROTECTION.

See JURISDICTION, 2.

PROTECTOR.

Form of petition, evidence, and order, on an application to the Court to consent, as protector of a settlement, to the barring of an entail. *In re Gravenor*, 700

PROVISIONAL COMMITTEE-MAN.

See PUBLIC COMPANY, 2.

PUBLIC COMPANY.

1. Construction of a Railway Act, as to the forfeiture of interest on shares upon which the calls were not

all paid up. *Naylor v. South Devon Railway Company*, 32

2. A. being a provisional committee-man of a provisionally-registered joint-stock company, was called on by a committee appointed to wind up the affairs of the company, to contribute his share towards the expenses. On his declining to do so, they, by arrangement with a creditor of the company, brought an action against A., in the name of the creditor, for the amount due to the latter. A. then filed his bill for and obtained an injunction to restrain the proceeding at law. On the coming in of the creditor's answer admitting the above facts, but stating that the committee who were suing in his name would guarantee A. from all liability, on his contributing 75*l.*, being his proportion of the expenses of the company, the Court continued the injunction, on the terms of A. bringing that amount into court. *Cutts v. Riddell*, 226

3. Form of order of reference as to temporary investment on a proposed real security of money paid into court, upon the purchase of land by a railway company. On the Master reporting against the proposed investment, and that no investment on real security would be for the benefit of the parties:—*Held*, that it was competent to the Master so to report, and the Court declined to order the investment to be made. *Ex parte Franklyn, Re Great Northern Railway Act*, 1846, 528

4. Notice given to a landowner by a railway company, of their intention to summon a jury, does not render it inequitable for them to proceed, in the meantime, under the 8 Vict. c. 18, s. 85, to obtain possession.

Nor is it sufficient ground to restrain the Company from changing the aspect of the property, that the jury may be thereby prevented from

accurately awarding compensation, with reference to its original state.

A nomination by the justices, under 8 Vict. c. 18, s. 85, of the surveyor employed by the company, and who has already, in the course of such employment, valued the land, does not necessarily invalidate a bond under the section.

The approval of sureties in a bond under the same section may be given by the justices on an *ex parte* application of the company.

But if such a bond be made to land-owners jointly, they being tenants in common of the land, it is not a sufficient compliance with the act.

Semble, that the condition of the bond must be for payment absolutely, and not on demand.

After service of a subpoena, and the appearance of a defendant, a motion for an injunction cannot be made *ex parte*. *Langham v. Great Northern Railway Company*, 486

See FRAUD.

INJUNCTION, 2.

VENDOR AND PURCHASER, 5.

WINDING-UP ACT.

RAILWAY COMPANY.

See PUBLIC COMPANY, 1, 3, 4.

WINDING-UP ACT, 3, 6, 17, 22, 23.

REFORMING SETTLEMENT.

See SETTLEMENT (REFORMING.)

REINVESTMENT.

See PUBLIC COMPANY, 3.

RE-LESSEE TO USES.

See JURISDICTION, 1.

RENT-CHARGE.

See JUDGMENT DEBT, 2.

SET-OFF.

REPAIRS.

See INFANT, 2.

REPLICATION.

See EVIDENCE, 8.

REPORT.

See INFANT, 5.

REVOCATION.

See WILL, 9.

SALE.

See MISTAKE.

VENDOR AND PURCHASER.

SECURITY.

See COSTS, 1, 2.

SEPARATE USE.

See HUSBAND AND WIFE, 3.

SERVICE.

See PRACTICE, 3, 5.

TRUSTEE, 3.

SET-OFF.

Where a testatrix devised a freehold estate to trustees upon trust, to sell and to pay 140*l.*, part of the proceeds, to A., and the residue of the proceeds to B., and appointed the devisees in trust her executors:—*Held*, that in a suit by A. and her husband against the trustees, for payment of the 140*l.*, the latter were not entitled to set off the damages or costs of an action, brought by them as executors against the husband, to recover a deposit note in the hands of the wife, forming part of the testatrix's estate.

The will authorised the devisees in trust to give receipts:—*Held*, that the cestui que trust of the proceeds, after payment of 140*l.*, was an unnecessary party, and the bill was dismissed as

STATE OF FACTS.

against him, with costs. *Reeve v. Richer*, 624

SETTLEMENT (REFORMING).

A settlement of a trust fund, whereby no legal estate was affected, reformed by a declaration in the decree without a reference, or the execution of any fresh instrument, and the form of such order. *Tebbutt v. Tebbitt*, 506

SETTLEMENT.

See CONSTRUCTION.

HUSBAND AND WIFE, 3, 4.

SHAREHOLDER (RETIRED).

See WINDING-UP ACT, 12, 13, 14, 15.

SHIP.

See MORTGAGE, 1.

SOLICITOR.

See JURISDICTION, 3.

PRIVILEGED COMMUNICATIONS, 3.
VENDOR AND PURCHASER, 5.

SPECIE (ENJOYMENT IN).

See WILL, 7.

SPECIFIC LEGACY.

See ASSETS, 1.

SPECIFIC PERFORMANCE.

See AGREEMENT, 2, 3.

JUDGMENT DEBT, 1.

VENDOR AND PURCHASER, 1, 2.

STAMP.

See EVIDENCE, 2.

STATE OF FACTS.

See EVIDENCE, 4, 9.
PRACTICE, 6.

TRUST.

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STIRPES (PER).

See WILL, 3, 4, 5.

STOP ORDER.

Form of stop order, when husband and wife join in an assignment of the wife's reversionary chose in action. *Moreau v. Polley*, 143

SUBPENA.

See PRACTICE, 7.

TENANT IN COMMON.

Bequest of personal estate, upon trust to assign the same to four persons, "and to each of their respective heirs, executors, administrators, and assigns:"—*Held*, to create a tenancy in common. *Gordon v. Atkinson*, 478

See JOINT TENANCY.

TIME.

See PRACTICE, 1.

VENDOR AND PURCHASER, 1.

TRADING COMPANY.

See WINDING-UP ACT, 1, 2, 3.

TRAVERSING NOTE.

See PRACTICE, 8.

TRUST.

A trustee having, under a settlement, a power of sale, with a trust for interim investment in the funds or on real security, concurred in a sale, and permitted the tenant for life to receive the purchase-money, which was not invested according to the trust:—*Held*, that the cestui que trust has not the option of requiring the trustee to replace the purchase-money, with in-

terest, or to buy such a sum of stock as the proceeds of the sale would have purchased, if invested at the time.

An allegation in the trustee's answer, that part of the purchase-money had been laid out by the tenant for life in the purchase of an estate, of which the plaintiff was in possession:—*Held* not to constitute a ground for directing, by the decree, an inquiry as to the fact, the matter being properly the subject of a cross suit. *Rees v. Williams*, 314

See BANKRUPTCY.

COMPOSITION DEED.

POWER, 4.

SETTLEMENT (REFORMING).

WILL, 1.

TRUSTEE.

1. Where the real estates of an intestate were sold under a decree in an administration suit, and the heir-at-law was a feme covert, who declined acknowledging the conveyance to the purchaser—*Semble*, that the heir was a trustee within 1 Will. 4, c. 60.

In such a case, where the costs of the suit exceeded the funds in the cause, the Court directed the costs of the purchasers, occasioned by the refusal of the married woman to make the acknowledgment, to be first taxed and paid; and, subject thereto, that the costs of plaintiffs and defendants should be taxed and paid rateably. *Billing v. Webb*, 716

2. Though a trustee for a public charity is not called on for twenty years, by the body to whom he is accountable, to account, yet it is his duty to tender his accounts to such body without requisition; and if he do not, he is liable to the costs of an information filed to compel an account, even although in the result the

charity proved to be indebted to such trustee. A trustee for a charity, against whom an information was properly filed, made a case by his answer, from which it must have been manifest that the trustee was not a debtor to the charity, and that the result of taking the accounts would not be of advantage to the charity. A decree was, nevertheless, sought and obtained, directing the accounts to be taken:—*Held*, that no costs subsequent to the hearing ought to be given on either side. *Att.-Gen. v. Gibbs*, 156

3. A married woman, having a general power of appointment over a reversionary trust-fund, subject to a previous life estate in another person, appointed it by way of mortgage, with a power of sale, under which it was afterwards sold. Her husband became bankrupt, and, after the determination of the life estate, the trustees paid the fund into court, under 10 & 11 Vict. c. 96. The purchasers thereupon presented a petition for a transfer of the fund to them. The petition was only served upon the trustees. The Court made the order, subject to a direction that it should not be drawn up for a fortnight, and that the husband's assignees should be served with notice that the fund would be transferred, if no objection were made within that period. *Ex parte Stutely*, 703

4. Where a testator devised estates to trustees, their heirs and assigns, on certain trusts, and the surviving trustee devised the trust estates upon the same trusts on which he held the same, *Held*, that the cestuis que trustent were entitled to have new trustees appointed of the original will. *Ockleston v. Heap*, 640

See AGREEMENT, 3.

INJUNCTION, 2.

JURISDICTION, 1.

WINDING-UP ACT, 10, 11.

USES.

See JURISDICTION, 1.

VENDOR AND PURCHASER.

1. In a suit by a vendor for specific performance against a purchaser, if the contract stipulated that the possession should be given at a specified day, it is competent for the purchaser to insist that both time and a vacant possession are of the essence of his contract; and the Court will receive as evidence that such was the purchaser's object, statements made by the agent of the purchaser at the time of signing the contract.

Where a purchaser has consented to enlarge the time for completion, and where a vacant possession was of the essence of the contract, it is competent for him to object to complete at the expiration of such enlarged time, if the possession is not then vacant, and if he has done no act towards completion of the contract, after he had notice that vacant possession could not be given at the day.

But where a purchaser had by his acts waived the time of completion in the first instance, and had gone on for some time inducing the vendor to incur expenses to perfect his title, and suddenly, upon the discovery that vacant possession could not be given according to stipulation, declined to complete, the Court, although it dismissed a bill filed against such a purchaser for a specific performance, dismissed it without costs. *Nokes v. Lord Kilmorey*, 444

2. A proposal by a purchaser to take the remainder of a lease was answered by a letter, which, after acceding to the proposal, added, "We hope to give you possession at half-quarter day:"—*Held*, that the addition did not introduce a new term, but that the acceptance was unconditional.

It is not sufficient for a party who intends to rely upon a waiver of title, to allege upon his pleadings the facts constituting the waiver; he must show how he means to use the facts by alleging that the title has been waived thereby.

Semble, that where the purchaser, after transmission to him of the original lease, prepares a draft assignment, and makes various objections as to repairs and other matters, but does not require production of the landlord's title, he will be considered to have waived its production.

Semble, that a decree for specific performance should not declare that the agreement ought to be performed, if a good title can be made. *Clive v. Beaumont*, 397

3. The owner of land, situated on an acclivity, conveyed, by a deed of 1816, a portion of lower land, with liberty to enter on upper lands and fetch water from a spring, and to cut open, cleanse, and cover in, such gutters and drains as might be necessary for the purpose of conducting the spring to the conveyed land; and also, with liberty to pass and repass, for ingress and egress, on the upper land around or adjoining the conveyed land, and to put any ladders against the cottages then intended to be built upon the conveyed land.

By another deed of 1820, other part of the lower land was conveyed, with liberty to take water from specified springs in the higher land, and to make such reservoirs in a particular field, part thereof, as might be necessary for taking up water for family use and other necessary purposes, and with liberty to pass for ingress and egress in the upper land surrounding or adjoining the conveyed land.

By other deeds of 1824, other portions of the lower land were released, with all water-courses, particularly as

the same ran to an inn on the conveyed land, from the upper land.

By other deeds of 1825, further portions of the lower land were released, with liberty to fetch water for family and domestic uses, at a well on the higher land.

By other deeds of 1834, other part of the lower land was released, with liberty to the lessee to make a covered goit, or water-course, across the bottom part of a field, part of the upper land, and to open and repair the same when necessary.

Several years afterwards, the upper land was sold, according to a particular describing it as fit for building, and subject to conditions of sale, providing, that, if any mistake were made in the description of the premises, or if any other error should appear in the particulars, such error or omission should not annul the sale, but compensation should be given or taken. The existence of the easements was not stated in the particulars or conditions:—

Held, First, that the circumstances of the purchaser living in the neighbourhood, being acquainted with the property, and passing constantly some of the wells on the lower land, supplied from the upper land, did not affect him with notice of the existence of the easements.

Secondly, that the existence of the easements, granted by any one of the deeds of 1816, 1820, and 1834, alone constituted a material defect in the title to the upper land.

Thirdly, that the existence of the easements granted by the deeds of 1824 and 1825, would have been alone sufficient to render the title subject to such serious doubt, that a purchaser could not be compelled to accept it.

Fourthly, that, under the circumstances, and inasmuch as the whole purchased land did not exceed thirty

acres, the purchaser could not be compelled to take the title, with compensation as to the lands prejudicially affected, which admeasured about four acres and a half. *Shackleton v. Sutcliffe*, 609

4. A vendor of freehold property, who, on his own purchase of it, had entered into a covenant to observe the covenants entered into with a former vendor, and which prohibited building on the land, put it up for sale, pursuant to particulars and conditions, noticing the existence of the covenant, but not stipulating that the purchaser should enter into any covenant on the subject. On a bill for specific performance, filed by the purchaser, *Held*, that the plaintiff was not entitled to a conveyance, unless on the terms of giving or providing for the vendor a sufficient indemnity against any breach of the covenant on the part of the plaintiff, his heirs, appointees, or assigns. *Held*, also, that a covenant on the part of the plaintiff, his heirs, executors, administrators, appointees, and assigns, with the defendant, his heirs, executors, and administrators, to the same effect, mutatis mutandis, as the covenant entered into by the vendor, on his own purchase, ought to be considered as a sufficient indemnity. *Moxhay v. Indervick*, 708

5. A purchase was completed under the powers of an act of Parliament, which authorised a corporation to purchase property compulsorily. The vendors being under disabilities, the purchase-money of their property was paid into court under the provisions of the act, whereby the Court was authorised to order all the reasonable costs, charges, and expenses attending the re-investment of the purchase-moneys in the purchase of lands to be settled to the same uses as the property purchased, together with the costs.

charges, and expenses of obtaining the proper orders, and of the other proceedings for such purposes, to be paid by the corporation. A contract was entered into for the investment of part of the fund in court in the purchase of certain property, free from encumbrances. The title, on investigation, proved to be subject to numerous encumbrances, and the purchasers' counsel advised that the vendors should procure all the encumbrances to be conveyed to the vendors, so as to shorten the conveyance. The draft reconveyances, eight in number, were submitted to the purchasers' solicitors, and settled by their counsel:—*Held*, that the corporation could not be charged with the costs thereby incurred, unless they were incurred with the express consent of the corporation.

A solicitor, in carrying in a state of facts to obtain the Master's approval of a contract to purchase, appended a long schedule thereto of the parcels proposed to be purchased. The taxing Master disallowed the charge for drawing, and only allowed for copying such schedule:—*Held*, that such disallowance was proper, although the Master in ordinary had allowed attendances upon a number of warrants proportioned to the length of the state of facts, including the schedule. *Held*, also, that the allowances in respect of these attendances were properly considered by the taxing Master as a compensation for other business actually transacted, and in respect of which he disallowed the charges. *Jones v. Lewis*, 245

6. Where interest is payable on purchase-money upon a sale by order of the Court, the purchaser must pay the full purchase-money and interest into court, without deducting the income-tax. *Holroyd v. Wyatt*, 125

7. Notwithstanding the general rule,

the Court may, under special circumstances, permit a purchaser to pay his purchase-money into court before he has accepted the title; but in such case express provision must be made against his taking possession until he shall have accepted the title. *Dempsey v. Dempsey*, 691

8. *Held*, that a purchaser under a decree could not be permitted to pay his purchase-money into court, without accepting the title, although all parties consented, and although the conditions provided, that, if from any cause whatever the money should not be paid by a particular day, the purchaser making default should pay interest from that day:—*Held*, also, that the above condition did not render the purchaser liable to pay interest, where he had given notice, (as was the fact,) that his money was lying unproductive, and the delay arose from the state of the title. *Denning v. Henderson*, 689

See MISTAKE.

PRIVILEGED COMMUNICATIONS, 1.

VIS MAJOR.

See AGREEMENT, 1.

WAIVER OF TITLE.

See VENDOR AND PURCHASER, 1, 2.

WASTE.

See INJUNCTION, 5.

WAYLEAVES.

See AGREEMENT, 2.

WIFE.

See HUSBAND AND WIFE.

STOP ORDER.

TRUSTEE, 1.

WINDING-UP ACT, 9.

WILL.

Trust for Accumulation.

1. A testator, after bequeathing to his daughter (a widow) an annuity, and directing his trustees to set apart a sufficient sum of stock to answer the growing payments, bequeathed his residuary personal estate to and to be equally divided between his grandson and granddaughter, (by name,) as tenants in common; but, in case of the death of the granddaughter, and under twenty-one and unmarried, in the lifetime of the grandson, or in case of the death of the grandson in the lifetime of the granddaughter, under twenty-one, he bequeathed the whole to the survivor; and, after directing payment during the minority of the grandchildren for their maintenance, the testator directed that the clear surplus of the income of his residuary estate should accumulate in the hands of his executors, and be added to the principal of the share of his grandchildren in the residue, and directed that his grandchildren respectively should not be entitled to receive his or her share, or the accumulations, until after the death of their mother (the annuitant). The granddaughter married under age, and articles were executed on her marriage, whereby it was agreed, that, when she became entitled to the absolute and immediate possession of any part of the residuary estate, the same and all accumulations should be settled on certain trusts for the separate use of the wife for life, with subsequent trusts for the husband and children, and a proviso referring to and dependent on the trust for accumulation in the will. On a bill filed by the granddaughter during her mother's lifetime, for a transfer of the fund:—*Held*, that the direction to accumulate in the will was precarious and ineffectual, and was not rendered otherwise by the settlement; and

that the granddaughter's moiety became capital at her marriage; and that the accumulations since that period belonged to her for her separate use. *Swaffield v. Orton*, 326

Gifts to a Class.

2. Residuary bequest to a brother of the testator for life, and after his death to his wife, and at her death to go to such of the testator's relations as survived them:—*Held*, to give the whole to the only one of the brothers of the testator who survived the tenants for life, to the exclusion of the children and representatives of brothers of the testator who survived him, but died in the lifetime of the second tenant for life. *Bishop v. Capel*, 411

3. Bequest of residue in moieties in trust for two tenants for life, and at the death of each, in trust as to her moiety to the children of the two who should be living at the death of the deceased tenant for life, and the issue of such of the children as should then be dead:—*Held*, to take effect per capita. *Abbey v. Howe*, 470

4. A testator gave his property (all being personalty) to trustees upon trust to pay his debts, and he gave certain legacies and three annuities to three ladies, and he gave the residue of the dividends arising during the lives of the three annuitants to H. S. and A. C., married ladies, for their lives; and after the deaths of the three annuitants, as to all the rest of his estate, he bequeathed the same to the said H. S. and A. C., and their several children, to be divided between them in equal shares:—*Held*, first, that there was an intestacy as to the surplus income from the death of the survivor of H. S. and A. C., until the death of the survivor of the three annuitants:—*Held*, secondly, that the gift to H. S. and A. C., and their several children, was a gift per capita,

and not per stirpes. *Cunningham v. Murray*, 366

5. Bequest to testator's wife of the use and usage of all his effects for her life, and at her death, bequest of the same to four nieces, by name, to be by them equally divided, share and share alike, and at their deaths to go equally, share and share alike, to their children:—*Held*, to give the respective children their parents' share only. *Arrow v. Mellersh*, 355

Estate by Implication.

6. A will contained a devise of realty in trust for A. for life, remainder to B., his wife, for life, and after the death of the survivor, to sell and divide the proceeds equally among the children, whose shares were to be vested at twenty-one for sons, and twenty-one, or marriage, for daughters, with a proviso postponing payment in the event of any shares vesting in the lifetime of either tenant for life. The will also contained a bequest of stock in trust to pay the dividends to A. for life, and on his death, to divide the principal among his children equally, the shares to vest at the same times as were before provided as to the proceeds of the realty; and there was a proviso, that, in the event of there being no child of A. and B., or all the children dying before twenty-one, or if daughters, before that age or marriage, the proceeds of the realty and the sum of stock should be divided equally among the members of a defined class of persons who should be living at the death of the survivor of A. and B. or A.'s children or child, as, according to the trusts thereinbefore declared, the case might require:—*Held*, that the last of these clauses must be read distributively, and that it did not give to B., by implication, a life interest in the stock. *Drew v. Killick*, 266

Conversion.

7. Residuary devise and bequest, on

trust to pay the dividends, interest, and annual produce of the testator's real and personal estates to the separate use of his daughter or daughters for life, and after her or their decease to pay, transfer, and equally divide the whole of his real and personal estate among the issue of his daughter or daughters; and for want of such issue, to pay certain legacies, and to sell the residue of the real and personal estate, not consisting of money:—*Held*, to entitle the tenant for life to the enjoyment of the personalty in specie. *Hunt v. Scott*, 219

8. A testator devised freehold estates upon trust to sell, with a declaration that the monies to arise from such sale should be deemed part of his personal estate, and that the income thereof, till sale, should be considered as part of the income of his personal estate, and be subject to the disposition of his personal estate thereafter made. The testator then gave his personal estate upon trust for four persons, as tenants in common. By a codicil, the testator revoked the residuary gift to one of the four, who was also the testator's heir-at-law and customary heir:—*Held*, that the heir was entitled to so much of the lapsed residue as consisted of real estate. *Gordon v. Atkinson*, 478

Revocation.

9. Testatrix by will bequeathed 3000*l.* in trust for C. for life for her separate use, and after her death, for her children; and in case there should be no such children, in trust for P. By a codicil, stating that C. had been largely provided for from other sources, the testatrix deducted the sum of 2900*l.* from the legacy of 3000*l.*, and revoked so much of the legacy accordingly, leaving C. 100*l.* only, as a remembrance of her affection:—*Held*, that the legacy of 3000*l.* was revoked in toto, and that, in lieu of it, the le-

gacy of 100*l.* was given for the absolute benefit of C., and that P. took no interest either in the 100*l.* or any part of the 3000*l.*

Effect of conflicting dispositions in a will and in a codicil, of the same residuary personal estate. *Sandford v. Sandford*, 67

Construction generally.

10. Upon the construction of a will and codicil, *Held*, that a substituted executor was not entitled to a legacy of 100*l.*, given by the will to the original executor, for his trouble in the execution of it. *Finch v. Secker*, 34

11. Upon the construction of a will, *Held*, that an annuity was charged upon the capital as well as upon the income of the testator's estate. *Wroughton v. Colquhoun*, 36

12. A testator, by a will not executed so as to pass freehold estates, gave freeholds and copyholds to his brother, on condition of the latter joining the testator's nephew in the purchase of certain annuities, and gave to the nephew freeholds, leaseholds, and personalty on a similar condition. The brother disclaimed:—*Held*, that the nephew must make provision for one-half of the annuities.

One of the annuities was directed by the will to be paid to the widow so long as she should live, and if she had any child born, such sum to be continued for its life. There were three children born:—*Held*, that the direction applied to the eldest only; and that, taking the annuity, she was bound to give effect to the other annuity, and to the gifts to the nephew, as regarded the one-third share of freeholds which descended to her.

Bequest of 500*l.*, or an annuity of 25*l.* for life, *Held* not to give the option to the legatee, but to the parties interested in the property subject to the annuity. *Wilson v. Wilson*, 152

13. A testator gave the residue of

his estates to trustees, in trust to pay the income to each of his seven children for life, and after the decease of each of his children, in trust to distribute the capital of each deceased child's share among his or her children; and, in case any of his children should die without issue living at his or her death, then to divide the interest and capital of such child so dying equally amongst the survivors or survivor of the testator's said seven children, or the issue of such of them as should be then dead, in manner by the will before directed concerning the original shares. The will contained a clause against the alienation of any share. Of the seven children who survived the testator, two died leaving children, and A. and B., two other of the children, successively died without issue:—*Held*, that the share which accrued to B. on A.'s death, followed B.'s original share, and passed to the surviving children of the testator and the issue of the two children who had died leaving issue. *Goodman v. Goodman*, 695

See ASSETS.

MORTMAIN.

TENANT IN COMMON.

TRUSTEE, 4.

What Companies not within Act.

1. A registered company for the insurance of agricultural cattle, *Held* not so clearly a trading or commercial company as to be within the operation of the Winding-up Act, 1848. *Ex parte Spackman, Re Agricultural Insurance Company*, 599

What Companies within the Act.

2. A pier company, incorporated by act of Parliament, with power to levy tolls for the use of the pier (including its use as a promenade), to erect baths, quays, wharfs, and warehouses, *Held* not so clearly a trading

or commercial company as to be within the Joint-Stock Companies Winding-up Act, 1848, which ought only to be applied in plain cases.

3. A provisionally registered railway company is within the act, and an order was made for winding up such company. *Re Brighton, Lewes, and Tonbridge Wells Direct Railway Company*, 604

4. *Quære*, whether a case at law can be directed to determine if a company is within the act. *Ex parte Burge, Re Herne Bay Pier Company*, 588

In what cases Order made.

5. It is not a sufficient objection to a petition for winding up the affairs of a company, under 11 & 12 Vict. c. 45, that there are no debts due from the company, or that the petitioner is one of the directors against whom a suit in Chancery is pending, seeking to make them personally liable to the shareholders for the losses of the company. *Ex parte Walker, and Ex parte Troubeck*, 585

6. In a provisionally registered railway company, 88,400 shares were allotted, the deposit being 5*l.* 5*s.* per share. On the bill being thrown out in the House of Commons, on the Standing Orders, and the directors abandoning the undertaking, 3*l.* 10*s.* per share was returned to the holders of 88,375 shares, who thereupon delivered up their scrip certificates, and took fresh ones purporting to entitle the holders to a pro rata division of the funds remaining after settling the claims on, and the liabilities of, the Company. The holders of 87,940 of these new certificates received a further instalment of 10*s.* per share, and signed a release, admitting a certain balance only to be then in the hands of the directors.

An original holder of thirty shares, who received the former, but not the

latter instalment, presented a petition to have the company wound up under the Winding-up Act, alleging a refusal or neglect on the part of the directors to produce accounts, and alleging a misapplication of 15,000*l.* on payment of a deposit on an agreement for the purchase of land, contrary to the Registration Act:—*Held*, not a case for making at once an order to wind up the company, or even, without further materials, for a reference to the Master under the section, as to the expediency of winding up the company.

But, it appearing that the petitioner's application to see the accounts had not been attended to, the petition was ordered to stand over, to give him an opportunity of seeing them. *Ex parte Pocock, Re Direct London and Manchester Railway Company*, 731

Contributory—Executor.

7. By the deed of settlement of a banking company, executors of deceased shareholders had the option of becoming shareholders, on giving certain notice, or of selling the shares; and until the option was exercised, the dividends might be retained by the company as a guarantee fund. In default of any person executing the deed in respect of such shares, after six months' notice, the shares were liable to forfeiture. A shareholder in the company bequeathed his shares to his executor in trust to convert them into money. The executor sold some of the shares, but did not give the proper notice to make himself a shareholder as to the rest, and was, nevertheless, permitted to receive the dividends on them for five years, signing the receipts as executor only:—*Held*, that he was not a contributory without qualification. *Armstrong's case, Re North of England Banking Company*, 565

8. A testator was a shareholder in

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a joint-stock banking company which was established under the provisions of the 7 Geo. 4, c. 46, and, according to the deed of settlement of which, personal representatives of deceased shareholders might become shareholders on giving certain notices. The executrix never gave the prescribed notices, but repudiated all interest in the concerns of the company. By her affidavit, in the course of the proceedings under the Winding-up Act, 1848, she deposed that the testator's assets were under 20*l.*, and had been all exhausted in payment of debts:—*Held*, that her name had been properly placed upon the list of contributories as executrix. *Thomas's case, Re North of England Banking Company*, 579

Contributory—Husband and Wife.

9. A married woman became, by such description, a registered shareholder in a joint-stock banking company, having purchased the shares with money arising from her separate estate.

The husband occasionally received the dividends on the shares, but always signed the receipts as his wife's agent. Though not a registered shareholder, he attended some meetings, and once held the proxy of an absent shareholder, which, according to the deed of settlement, a shareholder alone could do, and he took part in the proceedings. Previously to the dissolution of the company, his name had been substituted, without his consent, for that of his wife, in the share register:—*Held*, that he was not a contributory under the act, and his name was, upon motion, ordered to be struck out of the list.

Seemle, that liability to creditors of the company is not of itself sufficient to make a person a "contributory" within the act. *Angas' case, Re North of England Banking Company*, 560

Contributory—Infant.

10. A father purchased shares in a joint-stock bank for two infant sons, in the name of their uncle as a trustee, and the uncle's name was so entered on the share register of the company. By an agreement afterwards entered into, the uncle admitted that the father was entitled to the profits of the shares till the minors became of age, and it was agreed that then the uncle should assign the shares to the two minors, and the father agreed to indemnify the uncle in respect of the shares. The uncle received the dividends, and paid them to the father:—*Held*, that the father's name ought not to be inserted on the list of contributories, under the Winding-up Act, 1848.

A man may be liable to the creditors of a company, without being liable to have his name inserted in the list of contributories. *Fenwick's case, Re North of England Banking Company*, 557

11. Shares in a banking company were purchased for an infant without disclosing his infancy, the vendor signing a certificate required by the company's rules, that the purchaser was of age. On the discovery of the infancy, the infant's father covenanted with the public officer and two directors of the company, that the infant should perform the agreements contained in the company's deed of settlement, and to indemnify the company:—*Held*, that the father's name was properly placed on the list of contributories, under the Winding-up Act, 1848. *Reaveley's case, Re North of England Banking Company*, 550

Contributory—Retired Shareholder.

12. A., a shareholder in a joint-stock banking company, established under the 7 Geo. 4, c. 46, effectually assigned his shares in the company more than three years prior to the winding up of such company under 11 & 12

Vict. c. 45. It appeared that there was at least one other former shareholder in the same situation:—*Held*, that A. had been properly included in the list of contributories, and that it was no objection that his name had been placed on the list upon notice given by a continuing shareholder.

Held, also, that if the certificate of the decision given out by the Master to the party appealing differ from the statement on the file of the proceedings, the latter is to be assumed to be the actual decision. *Hawthorn's case, Re North of England Banking Company*, 571

13. At an extraordinary meeting of an unincorporated joint-stock company, resolutions were passed, purporting to empower the directors, on behalf of the company, to buy up shares of any shareholder wishing to retire, on the terms of the purchase-money being paid in debentures, and of a further advance of the same amount being also made by the vendor, on the same security.

On a purchase being effected on these terms by a director, from a shareholder who was not aware that the director was not purchasing on his own account:—*Held*, that the shareholder was not affected with constructive notice to the contrary; and, on his deposing that he had no actual notice, and there being no conflicting testimony, the Court directed the Master to review the list in which the shareholder was included as a "contributory" without qualification. *Hollway's case, Re Vale of Neath and South Wales Brewery Company*, 775

14. The directors of a joint-stock unincorporated company called an extraordinary general meeting, by a notice stating its purpose to be to receive from the directors a proposition for paying off advances made to the company, and discharging such other liabilities as required to be

paid at an early period, without appropriating to that purpose the funds accruing from the present trade. At the meeting, resolutions were passed for raising sums by loan notes; and one of the resolutions provided, that, if any shareholder should be desirous of retiring, the directors should be at liberty to purchase his shares at a price not exceeding 15*l.* per share, on his investing, or procuring to be invested, an amount not less than the purchase-money for his shares, and taking the loan note of the company, payable in five years, with interest for both the price of his shares and the loan. Copies of these resolutions were forwarded to all the shareholders, and some of them transferred their shares upon the terms proposed, making the stipulated advances, and taking loan notes. The powers of the directors, under the deed of settlement, did not enable them to enter into this arrangement:—*Held*, that such a transfer, made by a shareholder in 1844, and remaining unquestioned till 1849, when the company was wound up under the Winding-up Act, 1848, was not on the ground of acquiescence on the part of the company, or otherwise sufficient to restrict his liability as a contributory to the period when he so parted with his shares, whatever might be the equities between him and individual shareholders. *Morgan's case, Re Vale of Neath and South Wales Brewery Company*, 750

15. Where a shareholder in a company had taken all the proper steps within her power to assign her share, but the directors omitted to assent to or dissent from the sale for a period exceeding two months, and until the company stopped payment:—*Held*, that, nevertheless, the name of such shareholder had been properly placed upon the list of contributories without qualification. *Chartres' case, Re North of England Banking Company*, 581

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16. Form of petition, order, and proceedings under the Joint-stock Companies Winding-up Act. *Re North of England Banking Company*, 545

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The Court refused to sustain the former order at the request of an independent contributory; but discharged it without prejudice to any application that might be made to wind up the company.

Quære, whether, where an order for winding up is discharged on account of the omission of material circumstances in the petition, contributories can recover their costs of attending before the Master against the petitioner for winding up. *Ex parte Barnett and Others, Re Ipswich, Norwich, and Yarmouth Railway Company*, 744

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19. An official manager of a joint-stock company, appointed under the Winding-up Act, 1848, entered into an agreement with the executrix of a deceased shareholder, to accept 2000*l.* in lieu of a much larger sum, claimed

to be due in respect of the then present call already made, and together with a security for the contribution by her towards any future calls, to the extent of 1000*l.*, as a compromise of all claims of the company on the executrix and her testator; of which agreement the Master certified his approval by a special report. The Court, upon motion, confirmed the report. *Hughes's case, Re Nister Dale Iron Company*, 606

Practice—Contributories, Notice to.

20. On a notice to a person that her name was inserted in the list of contributories in a particular character, she attended before the Master, by her solicitor, to oppose the insertion of her name altogether:—*Held*, that she did not thereby waive any objection to the sufficiency of the notice for the purpose of enabling the Master to decide that she was a contributory without qualification; and the Master who had so decided upon such a notice, was directed to review his report.

Quære, whether, in such a case, a new notice can be effectually given. *Hutchinson's case, Re North of England Banking Company*, 563

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23. It is within the jurisdiction of the Master to discharge the petitioner upon whose petition the affairs of a company are directed to be wound up from any further attendance before him in the proceedings. *Barber's case, Re London and Manchester Direct Independent Railway Company,* 726

24. Although the Winding-up Act authorises the Master to require every person to produce documents relating to the company, in his possession, without any express reservation of the rights of lien, this Court cannot interfere to destroy or injure the lien of solicitors, nor adversely order the production of documents on which they have a lien. *Potter's case, Re Oxford and Worcester Extension and Chester Junction Railway,* 728

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